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Supreme Court, U
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OFFICE OF THE CLERK

No. 03-9627

In The Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 292

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Petition For Certiorari Filed March 4, 2004
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DOCKET ENTRIES

COURT OF COMMON PLEAS
TRIAL DIVISION
APPEALS UNIT

11-6-85		Courtroom 602 Presiding Honorable David Savitt Defense counsel ill. Cont. November 13, 1985, rm. 602, 12:00 Noon for arraignment. By the Court, Savitt, J.
11-13-85		Courtroom 602 Presiding Honorable David Savitt Deft. formally arrainmed. Continued for status, 12-16-85, rm. 602, 9:00 A.M. By the Court, Savitt, J.
-------	D-1	Motion to Suppress Evidence and Identification, filed.
12-16-85		Courtroom 602 Presiding Honorable David Savitt Possible waiver trial. Motion to be heard at time of trial. Place in ready pool. By the Court, Savitt, J.
12-13-86	D-2	Motion to Transfer from Common Pleas Court, Trial Division, Criminal Section to Common Pleas Court, Family Division, Juvenile. Section, filed.

12-13-86 Courtroom 602
Presiding Honorable David Savitt Counsel,
Moira Dunworth, Esq.
Steno – Marge Canterino

Defense motion to de-certify defendant and transfer matter to Juvenile Court for disposition is argued and denied. By the Court,

Savitt, J.

Defendant Pleads:

1272 – Guilty to 1st count – M-1.

1275 – Guilty to Murder, 2nd Degree.

AND NOW SENTENCE:

1272 – Not less than one (1) year, nor more than two (2) years in the State Correction to be served concurrently with sentence on 8510-1275. By the Court,
Savitt, J.

1275 – The defendant is sentenced to serve Life Imprisonment in State Correctional Institution. Recommended that sentence be served in Camp Hill, S.C.I. or a suitable facility due to defendant's age. By the Court,

Savitt, J.

8-21-86 D-3 Petition under Post Conviction Hearing Act, filed.

2-23-87 D-4 Motion for Leave of Court to Have Defense Counsel replaced by New Counsel, filed, pro se.

3-11-87 D-5 Amended Petition under Post Conviction Hearing Act, filed.

3-23-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-24-87 – Status. By the Court,

O'Keefe,

3-24-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-25-87 for status. Attorney not present. By the Court,

O'Keefe, J.

3-25-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-27-87 – status. Attorney on trial elsewhere and unavailable. By the Court,

O'Keefe, J.

3-27-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-3-31-87 for status. Attorney F. Green ill. By the Court,

O'Keefe, J.

3-31-87 Courtroom 788
Presiding Honorable Joseph O'Keefe,

Amended Petition filed. C-6-3-87 – C/W answer and status. By the Court,

O'Keefe, J.

6-3-87 Courtroom 788
Presiding Honorable Joseph O'Keefe

C-8-14-87 for C/W answer and status. By the Court, O'Keefe, J.

-------	D-6	Commonwealth's Motion to Dismiss or Compel Specific Pleading of Defendant's P.C.H.A. Petition, filed.
9-3-87		Courtroom 788 Presiding Honorable Joseph O'Keefe C/W answer filed. "Specs" order signed. C-1-4-88 for Motion to Dismiss. By the Court, O'Keefe, J.
1-3-88	D-7	Answer to Commonwealth's Motion to Dismiss, filed.
1-4-88		Courtroom 788 Presiding Honorable Joseph O'Keefe Defense request. C-1-11-88 – Motion to Dismiss. By the Court, O'Keefe, J.
1-11-88		Courtroom 788 Presiding Honorable Joseph O'Keefe Motion to Dismsis, After argument, Decision, H.U.A. By the Court, O'Keefe, J.
1-29-88	D-8	Letter-Brief filed by Commonwealth.
7-25-88	D-9	ORDER: It is hereby ORDERED AND DECREED that the Commonwealth's Motion to Dismiss the Defendant's Petition for Relief under the Post Conviction Hearing Act is DENIED. It is further ORDERED AND DECREED that an evidentiary hearing be conducted on November 15, 1988 to address the claims raised in the Defendant's Amended Petition for Relief. By the Court, O'Keefe, J.

2-9-89		Courtroom 788 Judge ill. C-6-16-89 for hearing.
6-16-89		Courtroom 788 Presiding Honorable James McCrudden Franklin Green, Esq., permitted to withdraw. New Counsel to be appointed. C.F.N. By the Court, McCrudden, J.
7-28-89	D-10	ORDER: The Court orders the appointment of David Rudenstein, Esq., as counsel, to represent the defendant in the Above captioned homicide matter. This appointment is not transferable; is effective immediately; is inclusive of all appeals as well as any new trials. By the Court, [Illegible], J.
10-27-89		Courtroom 788 Presiding Honorable James McCrudden C-11-29-89 – Possible Motion to Dismiss. By the Court, McCrudden, J.
-------	D-11	Amended P.C.R.A. Petition, filed.
11-29-89		Courtroom 315 Presiding Honorable James McCrudden Amended Petition filed. C-1-30-90 – Commonwealth answer and status. By the Court, McCrudden, J.

1-30-90		Courtroom 788 Presiding Honorable James McCrudden C/W answer to be filed. Def. atty. on trial. C-4-18-90 for motion to dismiss. By the Court, McCrudden, J.
3-29-90	D-12	Commonwealth's Motion to Dismiss, filed.
4-18-90		Courtroom 788 Presiding Honorable James McCrudden Motion to Dismiss argument heard. Decision, H.U.A. By the Court, McCrudden, J.
11-29-90		Courtroom 633 Presiding Honorable Francis Biunno C-2-8-91 rm. 788. Comm. Motion to Dismiss held under abeyance pending hearing. Deft. to be brought down. By the Court, Biunno, J.
2-8-91		Courtroom 788 C-3-26-91 for hearing. Atty. present. No Judge.
3-26-91		Courtroom 788 Presiding Honorable James McCrudden Evidentiary hearing. Held under Advisement. By the Court, McCrudden, J.
7-23-91	D-13	Order of Judge McCrudden entered wherein the defendant's Petition for Post Conviction Relief is denied.

8-1-91	D-14	Notice of Appeal to Superior Court filed by: David Rudenstein, Esq. Status: IFP/XXXXXXXXXXX._____ Order of Judge McCrudden entered wherein PCHA counsel is relieved and new counsel is to be appointed. New Counsel appointed: _____
8-22-91	D-15	OPINION, FILED. McCRUDDEN, J.
	D-16	NOTES OF TESTIMONY: 10-10-85, 2-13-86, 1-11-38, 3-26-91
8-23-91		Record transmitted to Appellate Court.
11-27-96	D-18	Pro Se Petition Under The Post Conviction Relief Act, Filed.
11-27-96	D-19	Pro Se Memorandum Of Law In Support Of Defendant's Motion Under Post conviction Relief Act, Filed.
4-8-97		Continued to 6-17-97, Rm. 607 for Amended Petition or Finley Letter (or counsel to be removed). Savitt, J.
6-13-97	D-20	Finley Letter, Filed.
6-17-94		Finley Letter field with PCRA Unit. Continued 7-23-97, Rm. 607, for DISMISSAL. Savitt, J.
7-3-97	D-21	Pro Se Response To Finley Letter, Filed.
7-23-97		Defendant's Objections DISMISSED. PCRA Petition DISMISSED. Savitt. J.
7-24-97	D-22	Order of Judge SAVITT entered wherein the defendant's Petition for Post Conviction Relief Act is dismissed and no new counsel is to be appointed.

7-29-97 D-23 Record returned from Judge SAVITT
Opinion Filed.

8-21-97 D-24 Notice of Appeal to SUPERIOR Court filed
by: JOHN PACE
Status: XXXX/Pro se/XXXX _____

_____

_____

_____

New Counsel Appointed: _____

_____

_____

2-19-98 ------ Record transmitted to Appellate Court.

D-25 NOTES OF TESTIMONY:

10-9-85, 2-13-86, 1-11-88, 3-26-91, 4-8-97, 6-17-97, 7-23-97

APPELLATE COURT ACTION

Date: Opinion by: PER CURIAM

– Judgment of sentence affirmed by Superior Court.

12-3-98 – Order DENYING PCRA affirmed by Superior Court.

– Judgment of sentence/order _____ reversed/vacated

– Miscellaneous Disposition:

3-8-99 – Petition for Allowance of Appeal to the Supreme Court, filed 120 EAL1999.

7-29-99 – Petition for Allocatur Denied.

– Petition for Allocatur Granted.
Appeal Docket # _____

– Record sent to Supreme Court _____.

– Decision of the Supreme Court:

9-10-99 – Record returned to the Jurisdiction of the Court of Common Pleas Phila (9-14-99).
Defendant in Graterford at # AY6445

– Disposition Code 042/030 Letter Code B

9-16-99 – Record to: Microfilm: ✓
Other: _____

IN THE MUNICIPAL COURT OF PHILADELPHIA

ROOM 675 – CITY HALL

- - -

COMMONWEALTH	: CHARGES:
	: MURDER 2502,
VS.	: ROBBERY 3701,
	: POSSESSION OF AN
	: INSTRUMENT OF CRIME 907
JOHN PACE	: MC 85-09-3144

- - - -

Philadelphia, Pennsylvania

October 9, 1985

- - -

BEFORE: THE HONORABLE MITCHELL S. LIPSCHUT, JUDGE

- - -

APPEARANCES:

MICHAEL McGOVERN, ESQUIRE
Assistant District Attorney
For the Commonwealth

MOIRA DUNWORTH, ESQUIRE
Counsel for the Defendant

- - -

REPORTED BY:

SALVATORE NATALE,
OFFICIAL COURT REPORTER

[2] INDEX

COMMONWEALTH'S EVIDENCE	D.E.	C.E.
Detective Edward Rocks	5	16
(Badge Number 798)		

[3] MR. McGOVERN: Your Honor, it is my understanding for the purposes of the preliminary hearing, only, that there is a stipulation by and between counsel, that as to the following: That the decedent in this case is one Randolph Baldwin. That he was a life in being on September 28, 1985. That the date of the assault in question was September 18, 1985 and on September 28, 1985 Mr. Baldwin, who is a fifty-six year old negro male was pronounced dead the Presbyterian Hospital by Dr. Bethala. That a post-mortem examination was performed by Dr. Segal of the Medical Examiner's Office, of Philadelphia, and that Dr. Segal determined that the cause of death was cranio-cerebral injury. That is the stipulation for the purposes of the preliminary hearing only.

THE COURT: I take it from what I understand, there is going to be a statement. I take it there is a copy for the Court?

[4] MR. McGOVERN: I have a copy for the Court and there is a copy which I am going to be asking be marked C-1. which is the same copy as I asked that be provided to the Court Reporter, at the conclusion of the proceedings.

THE COURT: Any reason the Court can't read this item to itself and subsequently have it attached to the record and then make any argument, if counsel has any cross-examination, rather than going through the procedure of having it pains takingly into the record.

MS. DUNWORTH: No, Your Honor, not in terms of the contents of the statement. I would request the Court to have an opportunity to cross-examine.

THE COURT: Oh yes.

I take it the testimony would be that the officer – he received such responses that enabled him to take the statement. That would his testimony not that those are the facts, that he would testify to.

[5] MS. DUNWORTH: Yes, Your Honor.

THE COURT: Very well.

MR. McGOVERN: To be clear, the testimony of Detective Rocks, the warnings were provided to the defendant who is seventeen years old, and his mother, Dorothy Clements.

THE COURT: Very well.

The Court will read the statement.

(Whereupon there was a brief pause.)

THE COURT: Very well.

MR. McGOVERN: Could I call Detective Rocks to the stand?

THE COURT: You may.

COMMONWEALTH'S EVIDENCE

DETECTIVE EDWARD ROCKS (Badge Number 798, Homicide Division), having been duly sworn, was examined and testified as follows:

MR. McGOVERN: May I proceed?

THE COURT: Yes.

I take it there is a stipulation for the purposes of this hearing, that [6] C-1 is in fact the statement allegedly taken from this defendant regarding this matter?

MR. DUNWORTH: I would stipulate to that.

THE COURT: Very well.

MR. McGOVERN: For the record, also, an exact duplicate copy of the statement was provided to defense prior to the proceeding.

THE COURT: Yes.

MR. McGOVERN: There is one other thing I'd like to indicate, Your Honor.

This is a statement taken by Detective Edward Rocks. There is an additional, also a statement taken of the defendant by Detective Gerald Davis of West Detectives, that is not subject of this hearing.

THE COURT: Very well.

DIRECT EXAMINATION

BY MR. McGOVERN:

Q. Detective Rocks, you're assigned to the [7] Homicide Division of the Philadelphia Police Department, is that correct?

A. Yes, that's correct.

Q. Were you so assigned on September 30, 1985?

A. That's correct.

Q. And on Monday, September 30, 1985, did you have an occasion to come in contact with any individual that you see in the courtroom?

A. Yes, I did.

Q. Would you – did you come in contact with the defendant in this matter, John Pace?

A. Yes.

Q. Could you point to that person?

A. (No response).

THE COURT: Can we agree that the defendant is sitting with counsel?

MS. DUNWORTH Yes.

THE COURT: The defendant is in the courtroom.

BY MR. MCGOVERN:

Q. Where and when did you first come in contact with the defendant on September 30, 1985?

[8] A. At 1801 Vine Street in the sheriff's cell area in the basement.

Q. Did you have an occasion to interview the defendant on that day?

A. Yes, I did.

Q. And what time did you interview the defendant?

A. 1630 hours inside Homicide Division.

Q. And prior to interviewing the defendant, did you advise him of his Miranda warnings, his legal rights?

A. Yes, I did.

Q. Was the defendant accompanied by anyone at the time that you advised him of his rights?

A. Yes, his mother Dorothy CLements.

Q. Was she present with the defendant throughout the course of the interview with him?

A. Yes, she was.

Q. Did you advise both the defendant – did you advise the defendant of his legal rights in the presence of his mother?

A. Yes.

Q. Did you subsequently question the [9] defendant with regard to the seven questions, standard questions, indicating a voluntariness or lack of voluntariness to give a statement. . . .

THE COURT: That was stipulated to.

MS. DUNWORTH: That was stipulated to.

MR. McGOVERN: I will strike that with the Court's permission. May I withdraw that?

THE COURT: Stipulated all of that would be his testimony.

BY MR. McGOVERN:

Q. And these questions you asked the defendant, were in the presence of his mother?

A. Yes.

Q. And did the defendant and his mother indicate on the statement that you took from them, initialed as to each and every answer that were provided to you?

A. Yes, they each initialed each question and each signed the bottom of the page.

Q. The statement you took from the defendant, in the presence of his mother, how long was the body of the statement? That is the actual [10] question and answer portion?

A. (No response).

THE COURT: It speaks for itself. It is marked C-1 and attached by agreement.

BY MR. McGOVERN:

Q. What time did you conclude the interview with the defendant and his mother?

A. 1750 hours, 5:50.

MR. McGOVERN: I have nothing further at this time.

(At this time the following statement was incorporated into the transcript.)

QUESTION: John, I have showed you and your mother, Dorothy Clements, the copy of arrest warrant #140358 and you have been given your warnings. Can you tell me in your own words, about the robbery and beating of Randolph Baldwin, N/M/56 on 9-18-85 at 0435 hours on the highway at 18 N. 53rd STreet?

ANSWER: On that night, I left my house at eleven something and I went down 56th and Arch STreet and I went to my [11] friend's house. His name is Roger Lovett. I left there around three-thirty to walk home. I walked up Market STreet, and I turned up 53rd Street towards Arch Street. I saw the man walking towards Market Street on the the same side of the street as me. We were facing each other and we passed each other. When he passed me he stopped and looked at me. I asked him what was he looking at. He told me to get out of here that he knew what I was up to. I had a blackjack in my right back pocket and he swung at me. We was grabbing each other and I pushed him to the side and I hit him with it. I just hit him once and the police came up. I was going to rob him but I didn't ake anything from him.

QUESTION: When you struck the man with the blackjack what position was his body in?

ANSWER: He was leaning over halfway on his side.

QUESTION: What part of the man's body did you strike with the blackjack?

ANSWER: I hit him on the side [12] of the head.

QUESTION: What did the man do when you hit him in the head with the blackjack?

ANSWER: He fell backwards and I started walking and that's when the cops came.

QUESTION: Can you describe the blackjack?

ANSWER: It was black leather flat slapjack. (Pace was shown a slapjack by Det. Rocks and he stated that it was the same type but his was bigger.)

QUESTION: John, where did you get the slapjack?

ANSWER: I got it that night from Roger Lovette because I had to walk home at four-o'clock in the morning.

QUESTION: Why did the man swing at you?

ANSWER: Because he thought I was going to rob him.

QUESTION: Can you describe the man that you struck with the slapjack?

[13] ANSWER: He was about my size and he had a hat on and he was wearing a tan coat and brown pants on.

QUESTION: How much money did you have in your possession when you were walking home when this incident occurred?

ANSWER: I didn't have any money.

QUESTION: John, do you remember having a conversation with Sergeant McDonnell on 9-18-85 at about 0500 hours inside the 18th District at 5500 Pine Street?

ANSWER: Yes.

QUESTION: Do you remember what you told the sergeant?

ANSWER: I asked how the man was doing and I said I was sorry. I said that I didn't want to hit him I just wanted some money.

QUESTION: Why did you hit the man with the blackjack?

ANSWER: Because I thought he was going to hit me.

QUESTION: Did the man have anything in his hands or any kind of [14] weapon?

ANSWER: He only had a little brown paper bag in his hand.

QUESTION: When did you first see the police?

ANSWER: When I started walking away.

QUESTION: John, after you struck the man with the slapjack what did you do with the slapjack?

ANSWER: I saw the police car coming and I threw it inside a yard.

QUESTION: Did you strike the man with your fists before you hit him with the slapjack?

ANSWER: No. I grabbed him by his jacket and I threw him on the ground and when he was getting up that's when I hit him with the jack.

QUESTION: Where does Roger Lovette live?

ANSWER: He lives at 111 N. Arch Street – okay let me tell you the truth – I got the blackjack earlier in the [15] week and I went into somebody's car and took it. The Sunday before there was a small car around the corner with the window down. I went into the car and the blackjack was on the floor in the back. That's all I took because there was nothing else in there.

QUESTION: Can you, write and understand the English language?

ANSWER: Yes.

QUESTION: Are you presently under the influence of alcohol or narcotic drugs?

ANSWER: No.

QUESTION: What was the last grade you completed in school?

ANSWER: Ninth grade.

QUESTION: Are you making this statement of your own free will in the presence of your mother, Dorothy Clements?

ANSWER: Yeah.

QUESTION: Why are you making this atatement?

[16] ANSWER: I want to get everything right and it is the truth.

MS. DUNWORTH: May I proceed?

THE COURT: You may.

CROSS-EXAMINATION

BY MS. DUNWORTH:

Q. Detective Rocks, do you know how old Mr. Pace is?

A. Did I know how old he is?

Q. Yes.

A. Yes, seventeen.

Q. Were you aware of his age at the time you took his statement?

A. I was.

Q. Can you tell the Court when he was apprehended?

A. He was charged with the murder warrant on the 30th.

Q. Had he been in custody prior to that time?

A. Yes, he had.

Q. How long had he been in custody prior to that?

A. Since the incident, the night of the incident.

[17] Q. When was that?

A. September 18th.

Q. He had been in custody from September 18th until the time he gave a statement, which was September 30th, is that correct?

A. To the best of my knowledge, yes.

Q. And I would take it that the statement was given subsequent to the death of Mr. Baldwin?

A. That's correct.

Q. When did Mr. Baldwin die?

A. I believe on the 28th.

Q. Two days prior to the time that my client was interviewed, is that correct?

A. That's correct.

Q. Do you recall, I don't know if this is self evident. I'd like to ask. What time did the statement begin?

A. The statement began 1630 hours.

Q. And it ended when?

A. 1750, which would be 5:50 p.m.

Q. And can you indicate to the Court how long after his mother arrived at the station that the statement was taken?

A. Approximately ten minutes.

[18] Q. And can you tell me how long prior to the time that Mrs. Clements arrived that Mr. Pace had been in your company?

A. In my company?

Q. Yes sir.

A. He was in the homicide for a little over an hour.

Q. Prior to the time his mother came?

A. Yes.

Q. Did you speak with my client during that hour before his mother came to the station?

A. No, I did not.

Q. Did anyone else, of the Police Department, speak with my client before his mother arrived?

A. Not that I know of.

Q. Now, the statement you took from my client, was it completed first to writing or was it placed immediately on the typewriter as my client gave it?

A. It was placed immediately on the typewri[illegible].

Q. And the copy, I see in front of me, Commonwealth Exhibit Number One, is that in fact a copy of the statement that you took directly and placed directly on the typewriter?

[19] A. Yes.

Q. Now, did you ever give Mrs. Clements a statement or read to her a statement of her rights separately from the time you gave Mr. Pace his rights?

A. (No response).

MR. McGOVERN: Objection.

THE COURT: Sustain the objection.

I don't know that she particular rights.

MS. DUNWORTH: I was just merely asking the question.

Now, if the Court would indulge me for a moment?

THE COURT: Yes.

(Whereupon there was a brief pause.)

BY MS. DUNWORTH:

Q. Was anybody else, sir, besides yourself, present during the entire time the statement was given by my client?

A. Just myself, your client and your client's mother.

MS. DUNWORTH: Very well.

Nothing further.

[20] MR. McGOVERN: I have no further questions, Your Honor.

(Witness excused.)

MR. McGOVERN: The Commonwealth rests its case at the preliminary hearing.

Moving for the introduction of C-1 into evidence. I move for the introduction of C-1 into evidence.

The Commonwealth's rests. That's our case.

THE COURT: C-1, I will mark this copy. Give it to the court reporter for the inclusion into the record.

MS. DUNWORTH: May I address the Court on a matter of bail?

THE COURT: Is there any meaningful argument, Miss Dunworth, for this matter?

MS. DUNWORTH: Not at this time, Your Honor.

THE COURT: The Court finds a prima facie case has been made out on all charges and the defendant is held for court and advised his pretrial arraign-[21]ment will be scheduled for October 23,1985 in Room 875 City Hall at noon.

Now, I would hear on the question of bail. First I will hear from the Commonwealth as to whether in accordance to the rules, Commonwealth has any aggravating circumstances within the law that wishes to place on the record to make this a capital case.

MR. McGOVERN: It's our contention it is a capital case and not bailable. It's our contention arguably and I submit prima facie cases I relatively first degree case and the aggravating circumstances we would argue that the murder was committed during the commmission of a felony, to wit, armed robbery. We request that the defendant continue to be held without bail.

MS. DUNWORTH: I submit the statement is not at all self evident. In terms having been robbery being committed or . . .

THE COURT: If you read the [22] language, the defendant's language in the statement, at one point, it's somewhat nebulous. At another point, he agrees and he did say, seems to confirm he had intended to rob the gentleman. Since that was his intention, committing the act, it seems to me, to certainly be enough to be a basis to sustain the Commonwealth's position on the matter.

MS. DUNWORTH: Your Honor, I don't wish to belabor this. I know it's a prima facie level. My client – I spoke to my client at length. He indicated somewhat different than what the statement indicated.

THE COURT: That may be. That's a matter of defense and although I have before me a statement introduced into evidence and based upon that, it seems to me I must sustain the Commonwealth's position.

Bail is denied.

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TESTIMONY CONCLUDED

Statement of: John A. PACE N/M/17 res: 4936 Thompson St. Phila. Pa. 19139

Date: Monday, September 30, 1985

Concerning: Murder of Randolph BALDWIN N/M/56 res: 127 N. Connastoga St Phila. Pa. which occurred on 9-18-85 at #18 N. 53rd St at 0435 hours on the highway.

STATEMENT OF: John A. PACE N/M/17, residence 4936 Thompson St. Phila. Pa. 19139, phone #473-3896, DOB 4-28-68.

DATE AND TIME: Monday, September 30, 1985 1630 hours

PLACE: Police Administration Building, 8th & Race St, room #104, interview room "C", Homicide Division.

CONCERNING: The robbery and homicide committed on 9-18-85 at #18 N. 53rd St at 0435 hours. The complainant/decedant being Randolph BALDWIN N/M/56.

IN PRESENCE OF: John A. PACE
Dorothy CLEMENTS (Mother) N/F/52, same address

INTERROGATED BY: Det. Edward J. ROCKS #798 Homicide Division

RECORDED BY: Det. Edward J. ROCKS #798, Homicide Division

I am Det. Edward J. ROCKS #798 of the Homicide Division, Philadelphia Police Department

We are questioning you concerning the robbery and beating death of Randolph BALDWIN N/M/56 which occurred on 9-18-85 at 0435 hours on the highway at #18 N. 53rd St Phila. Pa.

We have a duty to explain to you and to warn you that you have the following legal rights:

A. You have a right to remain silent and do not have to say anything at all. [/s/ JP /s/ D.C]

B. Anything you say can and will be used against you in Court. [/s/ JP /s/ D.C]

C. You have a right to talk to a lawyer of your own choice before we ask you any questions, and also to have a lawyer here with you while we ask questions. [/s/ JP /s/ D.C]

D. If you cannot afford to hire a lawyer, and you want one, we will see that you have a lawyer provided to you, free of charge, before we ask you any questions. [/s/ JP /s/ D.C]

E. If you are willing to give us a statement, you have a right to stop any time you wish. [/s/ JP /s/ D.C]

1. Q. Do you understand that you have a right to keep quiet, and do not have to say anything at all?

A. **Yeah.** [/s/ JP /s/ D.C]

2. Q. Do you understand that anything you say can and will be used against you?

   A. **Yes.** [/s/ JP /s/ D.C]

3. Q. Do you want to remain silent?

   A. **No.** [/s/ JP /s/ D.C]

4. Q. Do you understand that you have a right to talk with a lawyer before we ask you any questions?

   A. **Yes.** [/s/ JP /s/ D.C]

5. Q. Do you understand that if you cannot afford to hire a lawyer, and you want one, we will not ask you any questions until a lawyer is appointed for you free of charge.

   A. **Yes.** [/s/ JP /s/ D.C]

6. Q. Do you want to talk with a lawyer at this time, or to have a lawyer with you while we ask you questions?

   A. **No.** [/s/ JP /s/ D.C]

7. Q. Are you willing to answer questions of your own free will, without force or fear, and without any threats or promises having been made to you?

   A. **Yes.** [/s/ JP /s/ D.C]

Q. John, I have showed you and your mother, Dorothy Clements the copy of arrest warrant #140358 and you have been given your warnings. Can you tell me in your own words about the robbery and beating of Randolph BALDWIN N/M/56 on 9-18-85 at 0435 hours on the highway at #18 N. 53rd St?

A. On that night I left my house at eleven something and I went down 56th and Arch St and I went to my friend's house. His name is Roger Lovette. I left there

around three thirty to walk home. I walked up Market St. and I turned up 53rd St towards Arch St. I saw the man walking towards Market St on the same side of the street as me. We were facing each other and we passed each other. When he passed me he stopped and looked at me. I asked him what was he looking at. He told me to get out of here that he knew what I was up to. I had the blackjack in my right back pocket and he swung at me. We was grabbing each other and I pushed him to the side and I hit him with it. I just hit him once and the police came up. I was going to rob him but I didn't take anything from him.

Q. When you struck the man with the blackjack what position was his body in?

A. He was leaning over halfway on his side.

Q. What part of the man's body did you strike with the blackjack?

A. I hit him on the side of the head.

Q. What did the man do when you hit him in the head with the blackjack?

A. He fell backwards and I started walking and that's when the cops came.

Q. Can you describe the blackjack?

A. It was black leather flat slapjack. (PACE was shown a slapjack by Det. ROCKS and he stated that it was the same type but his was bigger)

Q. John, where did you get the slapjack?

A. I got it that night from Roger LOVETTE because I had to walk home at four O'clock in the morning.

Q. Why did the man swing at you?

A. Because he thought I was going to rob him.

Q. Can you describe the man that you struck with the slapjack?

A. He was about my size and he had a hat on and he was wearing a tan coat and brown pants on.

Q. How much money did you have in your possession when you were walking home when this incident occurred?

A. I didn't have any money.

Q. John, do you remember having a conversation with Sergeant MCDONNELL on 9-18-85 at about 0500 hours inside the 18th district at 5500 Pine St?

A. Yes.

Q. Do you remember what you told the Sergeant?

A. I asked how the man was doing and I said I was sorry. I said that I didn't want to hit him I just wanted some money.

Q. Why did you hit the man with the blackjack?

A. Because I thought he was going to hit me.

Q. Did the man have anything in his hands or any kind of weapon?

A. He only had a little brown paper bag in his hand.

Q. When did you first see the police?

A. When I started walking away.

Q. John, after you struck the man with the slapjack what did you do with the slapjack?

A. I saw the police car coming and I threw it inside a yard.

Q. Did you strike the man with your fists before you hit him with the slapjack?

A. No. I grabbed him by his jacket and I threw him on the ground and when he was getting up that's when I hit him with the jack.

Q. Where does Roger LOVETTE live?

A. He lives at 111 N. Arch St – OK let me tell you the truth – I got the blackjack earlier in the week and I went into somebody's car and took it. The Sunday before there was a small car around the corner with the window down. I went into the car and the blackjack was on the floor in the back. That's all I took because there was nothing else in there.

Q. Can you read, write and understand the English language?

A. Yes.

Q. Are you presently under the influence of alchol or narcotic drugs?

A. No.

Q. What was the last grade you completed in school?

A. Ninth grade.

Q. Are you making this statement of your own free will in the presence of your mother, Dorothy CLEMENTS?

A. Yeah.

Q. Why are you making this statement?

A. I want to get everything right and it is the truth.

/s/ John Pace DATE: 9/30/85 TIME: 5:50 PM
/s/ Dorothy Clemmens DATE: 9/30/85 TIME: 5:50 PM

Statement of:

Det. Edward J. Rocks #798 1750 hours 9-30-85

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ Salvatore Natale
Official Stenographer

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
HOMICIDE DIVISION

- - -

COMMONWEALTH	:	OCTOBER TERM, 1985
vs.	:	
JOHN A. PACE	:	NOS. 1272-1275

- - -

February 13, 1986

- - -

Courtroom 602, City Hall
Philadelphia, Pennsylvania

- - -

BEFORE: HONORABLE DAVID N. SAVITT, J.

- - -

APPEARANCES:

CHARLES GALLAGHER, ESQUIRE
Assistant District Attorney
For the Commonwealth

MOIRA DUNWORTH, ESQUIRE
For the Defendant

- - -

[2] THE COURT: This is the case of Commonwealth versus John Pace.

I understand there is a motion to Decertify?

MS. DUNWORTH: Yes, Your Honor.

THE COURT: I haven't seen the motion.

MS. DUNWORTH: Sorry, sir.

THE COURT: Is this the original that is being filed?

MS. DUNWORTH: Yes, sir. They would not take it for filing in the normal course of events, which would be 685. They explained I would need the Court to sign the order but since that was two days ago that I tried to file it, yesterday was a holiday, that's why I brought it here.

THE COURT: Let the original motion be placed in the Quarter Sessions file.

Do you have a copy for the Court?

MS. DUNWORTH: Yes.

THE COURT: I presume you have a copy.

[3] MR. GALLAGHER: Yes, Your Honor, I got a copy this morning.

THE COURT: You may proceed.

MS. DUNWORTH: As the Court is well aware, Your Honor, the burden is upon the defendant to show his need to be amenable to a program of rehabilitation, supervision, care, could better take place within the juvenile system than in the criminal system, and that is really black letter law, citing Commonwealth versus Pyle, Your Honor, which is a 1975 case and still really the basis of the law today, Your Honor.

In that regard, it is our contention that the statute which governs the juvenile aid, which governs whether a juvenile should or should not be transferred to the criminal system is rather ambiguous, Your Honor, and places an

unduly heavy burden upon the defendant, but nonetheless, we will proceed and try to set forth sufficient reasons for the Court to consider the transfer, Your Honor.

THE COURT: You may present any facts that you deem relevant to secure this [4] position, and you can do some of them, I'm sure, by stipulation with counsel, and you may have some agreement as to the defendant's age and other things. Otherwise, any testimony you want to present will be heard.

MS. DUNWORTH: The stipulation I presume would be that my client was 17 at the time of his arrest in September of 1985, for originally, what was a robbery charge, and aggravated assault, and upon the death of Mr. Baldwin –

THE COURT: The defendant was 17 at the time of the offense?

MS. DUNWORTH: Yes, at the time of his arrest, which was September 18, 1985.

My client turned 17 in April, April 28th, to be specific, 1985.

Subsequent to my client's arrest for robbery and aggravated assault, Mr. Baldwin died while my client was in custody, and died on the 30th of September, so I believe we can certainly stipulate to those facts.

My client had completed the tenth [5] grade at West Philadelphia High at the time of his arrest. He was in the 11th grade.

Now admittedly, Your Honor, my client doesn't really have a terrific glowing record prior to the time of his

arrest and that's probably one of the reasons why he is here.

If he did have a terrific record, he probably wouldn't be here; however, I wish to point out that how my client has done in the limited time that he has been incarcerated is really what I think that the Court should be looking at as a determinant as to whether or not he is amenable to rehabilitation in the juvenile system.

As I indicated, he was arrested in September, '85. He has since that time attended the Youth Study Center school, which is right on the premises of the Youth Study Center itself.

In December of '85, a report was written by Mr. Goldberg and Mr. Ogden, over the signature of Mr. Paul Somerville, who is the principal of the school.

I would like the Court to look at [6] that and will indicate roughly what this report indicates and I will show it to the District Attorney before handing it up to the court.

My client was graded excellent in work habits, attitude, behavior, participation.

He was graded in only one other area and that was fair in the matter of skills, but that is, of course, the argument that we are making, that that is precisely what part of the problem is, is that his skills have been poor and probably but for that, among other factors, he may not – he may not be here at all.

Mr. Goldberg is the teacher. Mr. Goldberg indicated that my client has been cooperative and thorough in

school. He contributes in class and helps others who are not as capable.

Mr. Ogden, the counselor, indicated that John has a positive self concept and gives every indication that he will strive to develop meaningful objectives.

This report was made not at my behest, Your Honor. I would also like to add [7] that. My client handed this to me sometime ago, a month or so ago, without any request by me at that time.

He has, in addition, Your Honor, no prior convictions. There appears to be some question about a robbery, an arrest for robbery, which I am not sure of the status of, but he has no prior convictions.

His school record outside of the Youth Study Center school record, admittedly, has been poor. – He was a truant. He did not attend school with any great regularity, but I would like to point out to the court that for the two year period prior to the time of his arrest, he was, undoubtedly, a substance abuser.

His mother was aware of the problem prior to the time of his arrest. She has indicated to me that she found pills repeatedly on the person of my client or in his effects, among his effects or in his room.

She had him sent or the system had him sent to 48th and Parkside to the school there, to try to treat this problem and it remained [8] untreated or at least uncorrected until the time of his arrest.

At the time, on the night of his arrest, on the 18th of September, my client was clearly intoxicated. He had

ingested three valiums, had smoked reefer and had been drinking the better part of the evening.

Since the time of his incarceration, he is drug free. His family, as a matter of fact, his mother spoke with me and indicated that since the time of his arrest, her son has mentally markedly improved in his attitude, in his ability to cope with reality, which was one of the biggest problems that apparently she had had before the time of his arrest.

He lived with his mother and his siblings at 4936 Thompson Street up until the time of his arrest.

My client has a great deal of personal support from his family and I would like the Court to take judicial notice of the fact that on the left side of the Court, the entire [9] left side of the Court is filled with Mr. Pace's family. His father and his mother are both here, and they had been highly supportive of him and very concerned about, all around, the effects of the general tragedy both for Mr. Baldwin, of course, and for John.

Your Honor, because of the ambiguity of the act, and because of the ambiguity of the wording of the act, it is very difficult for counsel to know just exactly what would persuade this Court or any other court, for that matter, to make a determination that an individual should be sent back to juvenile court.

THE COURT: I have reviewed some of the most recent cases, and as I understand, once a prima facie case of murder has been made out, the criminal courts have original and exclusive jurisdiction and the burden of proof is on the juvenile to show that he does not belong in criminal court, and there are two rather recent court cases which set forth that as the law.

MS. DUNWORTH: One is the Brown case.

[10] THE COURT: That's one, and Pyle.

But there are some cases that indicate what the standard is, and as I understand it, the burden requires that the juvenile prove that he belongs in a juvenile setting by showing his need and amenability to the program of supervision and care and rehabilitation he would receive as a juvenile.

If the evidence does not affirmatively demonstrate, and that's really your burden, that the defendant would benefit from the special features of the programs, and that no special – and if no special reason is shown for sparing him from adult prosecution, jurisdiction remains here.

So really what I think you have to say is that he is amenable to supervision, and you must affirmatively demonstrate that he would benefit and there should be a special reason for sparing him adult prosecution, and factors involved would be the nature of the crime itself, a review of the individual's personal makeup, previous history and nature and circumstances of [11] the homicide.

You have indicated to me his age. I understand he was in the tenth grade. He had completed. the tenth grade, that he has no prior juvenile record, that he was not attending school regularly.

MS. DUNWORTH: Your Honor, may I –

THE COURT: And he was a drug user.

MS. DUNWORTH: Yes, sir. May I interrupt you?

He does have contact with the system in terms of arrest. There were a couple of arrests, but he has no

convictions. I think the Court should be aware of that, and I am sure Mr. Gallagher would point that out to you.

The point that I am trying to make is that with the limited contact that my client – he has never been incarcerated before, needless to say, but with the limited contact; that is, a period of five months that he has been in contact with the system; that is, since the time he has been incarcerated in September, he has attended [12] the school.

He has done very well in school. The report has been as I indicated, excellent in every area that would involve my client's corporation, and my client's input into the system that he is working with, Your Honor.

I would ask the Court to particularly note that in view of the fact that prior to that time, he was a substance abuser. Since that time, he has not been a substance abuser.

THE COURT: What do you call that?

MS. DUNWORTH: Substance abuser, Your Honor. By that I mean there's no specific thing that he was in the habit of taking. He took whatever was apparently available at any given time.

On the night of his arrest, he was probably intoxicated with three different forms of –

THE COURT: Miss Dunworth, with all due respect, I will take into account that since he has been in custody, he has attended school and [13] made progress, of course, and that letter may be marked, and I will review it.

The thing is you really have to show I think something beyond that here, because the case comes to this Court and it is only decertified if there is some special reason to decertify it.

In order to sustain that burden, I have to know more about the crime involved, more about what this defendant was charged with. He is close to 18.

MS. DUNWORTH: He is now, Your Honor. But he was less than 17 and a half at the time.

THE COURT: What I really want to do is give you a full opportunity to present whatever evidence that you want and if there's anyone you want to call or anything you want to present or anything that can be stipulated to along the lines of what is relevant, I will be glad to hear it, and if you call any witnesses, of course, they can be cross-examined and the Commonwealth can call witnesses. Then I will hear [14] argument.

What you are really doing is submitting an argument.

MS. DUNWORTH: Yes.

THE COURT: Before you do that, I want to make sure that the record is complete. So far, what I have on the record is that the defendant was 17 at the time. He was a student in tenth grade.

He has no prior convictions though he does have contact with the law as a juvenile. He did not attend school regularly. He was a substance abuser.

On the night of the episode, he was on drugs and alcohol, and that he attended school during his incarceration and did well.

That's the state of the record. Is there anything else you want to introduce?

MS. DUNWORTH: I think, Your Honor, you have a brief rundown of the incident and the charges came out of that incident.

Mr. Baldwin is alleged to have been walking in the area of 46th and Market, and this [15] was early in the morning, approximately around 5:00.

THE COURT: How old was he?

MS. DUNWORTH: Mr. Baldwin was in his fifties, Your Honor.

Apparently, both parties were walking towards each other. The statement that was given by my client, he gave two statements, one at the time of his initial arrest before Mr. Baldwin died and the second, subsequent to Mr. Baldwin's death, when he was charged with murder.

He indicated that, and was fairly consistent in both statements, that both people; that is, my client and Mr. Baldwin were walking in opposite directions toward each other.

Mr. Baldwin apparently said something to my client, such as what are you doing, or something to that effect. My client said what do you mean. He said I know what you're up to; that is, Mr. Baldwin.

Mr. Baldwin, according to the statement, reached out to my client. My client had a blackjack in his pocket.

[16] He hit Mr. Baldwin with the blackjack. He did not rob Mr. Baldwin. There is certainly an intimation that my

client may have contemplated that, at least according to the statements. There were two statements.

My client walked away from Mr. Baldwin, and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.

I think it significant, your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fistfight was ensuing, so it's a very ticklish question as to when the intent to rob occurred.

THE COURT: For the purposes of this motion, I don't know that. What you really told me is the substance of the crime is that the deceased was a 46 year old man.

MS. DUNWORTH: In his fifties.

THE COURT:

[Illegible] This defendant is charged with killing him with a blackjack during the course of [17] a robbery.

Ms. [Illegible]

THE COURT: I'm not at this point at all seeking to [illegible] his guilt or innocence and his presumption of innocence remains with him but the nature of the crime is a striking with a blackjack on 46th and Market of a 50 year old man after some words occurred, while he was under the influence of drugs and narcotics.

MS. DUNWORTH: Exactly. The question then remains, your Honor, I think for the Court's consideration with regard to the seriousness of the charges, is that it was a spontaneous act, that there was a weapon involved

from the point of view of the Commonwealth; however, the weapon had not been drawn prior to the time of these words.

It was after these words had taken place that the weapon and after, apparently, the defendant, Mr. Pace, assumed that there was some kind of aggressive action on the part of Mr. Baldwin.

I know I am getting beyond the area [18] for the Court's consideration.

THE COURT: What other reasons, what other evidence do you want to present that would make this a special circumstance or make this the type of circumstance that should be removed from the criminal court system?

It seems, in all candor, that the most significant thing you have is that he has done well at the school afterwards, and I am not trying to minimize that or demean it, but I don't know if that alone warrants decertification under the law.

You may introduce whatever else you wish.

MS. DUNWORTH: Your Honor, I don't have any other argument to make. I just believe that given the personality of this young man, and I have spoken with him many times. I have spoken with his family. I believe that from close contact with the family, that he is very much aware of the seriousness of his position, of the seriousness of the charges, your Honor.

He feels remorse for the entire [19] incident, and I believe that he is, I truly believe that he is amenable to treatment in the juvenile system.

His family certainly believes that. I have input from his brother, who has cal. d me repeatedly, spoken to me about how his brother is doing in school, what his brother's mental state is, how his brother feels about this matter.

Your Honor, I can't do magic. I can't make anything appear that isn't the case. I would just ask the Court to consider the facts that I have presented to the Court, and the intangible factor of this young man's particular own unique personality which I believe, his family believes would render him amenable to treatment and supervision of the juvenile system, and that being the case, your Honor, I would ask the Court to transfer him back to the juvenile system.

THE COURT: Is there anything else you want to present, any other witnesses that you want to testify?

Is there anything you wish to [20] present on behalf of this motion?

MS. DUNWORTH: No, I have no other information to present to the Court.

THE COURT: Thank you.

MS. DUNWORTH: Thank you.

MR. GALLAGHER: Your Honor, I believe what we have heard so far is argument from counsel based on allegations that she has, based on her review of the case.

I respectfully submit to the court that as far as the Commonwealth is concerned, I can stipulate to his age, I can stipulate to the fact that he finished the tenth grade,

and I can stipulate to the fact that there are no adjudications in juvenile court.

I have a copy of an extract of juvenile contracts, and I would submit that to the Court as evidence.

Judge, as far as the other arguments of counsel, we have no evidence to that effect except counsel's reliance upon her review of the case, and I would respectfully submit to the Court even if all that counsel has argued to [21] the court today was presented via testimony, there isn't a sufficient amount of facts there to overrule or to carry her burden or carry the defendant's burden as to why this case would be properly in the juvenile court.

As the Court has indicated and the state of the law is clear that it is the burden of the defendant to prove.

It is clear, even taking counsel's arguments, that we have a picture of an individual here who I believe is clearly not amenable to rehabilitation in the juvenile system due to the fact, Judge, that in a little bit more than two months, he will be 18 years old, and in that situation, Judge, he would not be permitted in any juvenile facility.

Secondly, your Honor, when we take into consideration the facts of this case, if the Court wishes, I will submit the statements at this stage of the defendant and also, I have today testimony from the arresting officer, and your Honor, it is up to the Court to determine, based upon a review of those statements and the [22] testimony, as to what actually occurred here.

Counsel, with all due respect to counsel, has put a favorable light on this incident as far as indicating that there may have been some aggressive behavior by the victim, and I would submit, your Honor, that your review

of the statements as well as the testimony of the police officer indicates completely to the contrary.

THE COURT: Just as I suggested to Miss Dunworth, I suggest to you, as far as I am concerned, I'm not determining the guilt or innocence.

I am satisfied that it was a killing with a blackjack on the street.

MR. GALLAGHER: Fine, Judge. And it was in the course, I believe it was in the course of a robbery and that's clear from the statements.

THE COURT: May the letter be introduced and marked as C-1.

Also, may the juvenile record be marked and introduced as D-1, so it will be available and the record is clear.

[23] MR. GALLAGHER: Your Honor, I believe you want the letter as D-1 and the juvenile record as C-1.

THE COURT: That isn't what I said but that's what I meant to say, Mr. Gallagher.

(Extract of Juvenile Record was marked Commonwealth Exhibit C-1 for identification, and Report from the Youth Study Center School was marked Defense Exhibit D-2 for identification).

MR. GALLAGHER: Judge, counsel has had an opportunity to view what is marked C-1.

I have not had the opportunity because I mistakenly thought it would be here, the J file of the defendant which indicates the course of those contacts. In fact, there were

three contacts prior to this incident, Judge, and one of which is still open.

There's an open bench warrant issued by Judge Poserino on October 9, 1985, based on a robbery charge from November 27, 1984.

I believe that bench warrant was issued because the defendant was incarcerated on [24] this offense, but regardless, Judge, that is still an open offense.

I know what the facts of that offense are. I determined that through the detectives but I don't have that information here in Court today. I have been on the phone all morning trying to get it over here.

THE COURT: The juvenile record shows three previous contacts, one withdrawn, one no disposition and one an open bench warrant.

I also have D-1, which does show that at the Youth Study Center school, the defendant was making progress.

Can I see counsel for a moment?

(Whereupon, an off the record discussion was held in the anteroom).

(The following occurred in the courtroom:)

THE COURT: With respect to the motion to decertify, under the existing law, I don't think it would be appropriate for this Court to remove this case to the juvenile court.

There has been nothing presented [25] and there is no indication that there is a need and amenability for this

defendant to the program of supervision, care and rehabilitation that he would receive as a juvenile.

The Court finds that the evidence does not affirmatively demonstrate that the defendant would benefit from the special features of the programs in the juvenile Court system, and the evidence shows no special reason for sparing him from adult prosecution and punishment if and when the defendant is found guilty.

So the motion to decertify is denied.

It is twenty of one. We will proceed this afternoon. How do you contemplate proceeding, Miss Dunworth?

MS. DUNWORTH: Your Honor, I believe that a guilty plea is in agreement. We are in agreement that a guilty plea is in order, your Honor.

I will confer with the family again to make sure that that is their wishes and with my client, and when we come back, we will indicate [26] that to the court.

THE COURT: I would appreciate if you would confer fully again with the defendant and his family, and if the defendant wishes to enter a plea of guilty, I will ask him some questions concerning it to make sure that it is freely and voluntarily entered.

(Luncheon recess)

AFTERNOON SESSION.

MS. DUNWORTH: I apologize for my lateness but I had another engagement. I had to fit it in.

THE COURT: That's all right.

This is Commonwealth versus Pace. We are prepared to proceed. I understood before the luncheon recess that it may be a guilty plea.

Is that correct?

MS. DUNWORTH: Yes, sir.

THE COURT: If the defendant would rise and be sworn, I would like to ask him certain questions.

[27] THE CRIER: Place your right hand on the Bible. State your full name.

THE DEFENDANT: John Pace, P-A-C-E.

. . . JOHN PACE, after having been duly sworn, was examined and testified as follows:

THE COURT: To what does the defendant intend to plead guilty?

MS. DUNWORTH: Second degree murder, your Honor.

THE COURT: What about the other charges?

MS. DUNWORTH: And to P.I.C., and I believe the other charges will be nol prossed.

THE COURT: There's a voluntary manslaughter bill and a robbery bill.

MR. GALLAGHER: Yes, your Honor. It is my understanding that the defendant will plead guilty to bill 1272 of January term – excuse me, of October term, 1985, and bill 1275 of October term, 1985.

1272 is for possession of an instrument of crime, and 1275 is for murder in the second degree.

[28] Judge, upon the acceptance by the Court of that plea, if the Court does accept that plea, the Commonwealth is prepared to nol pros the other two remaining bills.

THE COURT: Mr. Pace, it has been indicated to me that you wish to enter a plea of guilty.

THE DEFENDANT: Yes.

THE COURT: To the charge of second degree murder and possessing instruments of a crime generally as set forth in bills of information October, '85, Number 1272 and 1275.

Is that correct?

THE DEFENDANT: Yes.

THE COURT: It has been further indicated to me that the charges of robbery and involuntary manslaughter and possession instruments of a crime weapon will be nol prossed if the plea is accepted.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: How old are you?

THE DEFENDANT: 17.

[29] THE COURT: What's the date and year of your birth?

THE DEFENDANT: 4/28/68.

THE COURT: Are your parents in this courtroom today?

THE DEFENDANT: Yes.

THE COURT: Would Mr. and Mrs. Pace be kind enough to come forward and be seated so that I can address you. I would appreciate it very much. Let them be sworn.

THE CRIER: Place your right hand on the Bible. State your full name.

THE WITNESS: Dorothy Clemmons.

THE CRIER: State your full name.

THE WITNESS: Morris Clemmons.

. . . DOROTHY CLEMMONS and MORRIS CLEMMONS, after having been duly sworn, were examined and testified as follows:

THE COURT: Mrs. Clemmons, you are the mother of the defendant, John Pace?

MRS. CLEMMONS: Yes, I am.

THE COURT: Mr. Clemmons, you are his father?

[30] MR. CLEMMONS: Yes, I am.

THE COURT: Was he living in your home at the time of this incident?

MR. CLEMMONS: He is living with his mother.

THE COURT: And you are separated?

MR. CLEMMONS: Yes.

THE COURT: I appreciate you being here. You may have a seat.

THE COURT: Mr. Pace, how far did you go in school?

THE DEFENDANT: Tenth grade.

THE COURT: Can you speak and understand English?

THE DEFENDANT: Yes.

THE COURT: Do you read and write English?

THE DEFENDANT: Yes.

THE COURT: Are you now under the influence of alcohol or any other drug?

THE DEFENDANT: No.

THE COURT: Have you understood everything that I have said so far?

[31] THE DEFENDANT: Yes.

THE COURT: Have you ever been in a mental institution or received treatment for mental illness?

THE DEFENDANT: No.

THE COURT: Miss Dunworth, do you know if the defendant is now suffering from any physical, mental, or emotional problem which might affect his understanding everything that is said today?

MS. DUNWORTH: No, I do not.

THE COURT: Mr. Pace, are you now suffering from any physical, mental or emotional problem which

might affect your understanding everything that is said today?

THE DEFENDANT: No.

THE COURT: Pardon me? You're not?

THE DEFENDANT: No, no.

THE COURT: Miss Dunworth, have you fully discussed this case with your client and fully investigated every question which either of you may have?

[32] MS. DUNWORTH: Yes, sir.

THE COURT: I say to you Mr. Pace, have you fully discussed this case with your lawyer and are you satisfied that she knows all the facts and has had time to fully investigate your case?

THE DEFENDANT: Yes.

THE COURT: To Mr. and Mrs. Clemmons. Have you discussed this case with Miss Dunworth, Mrs. Clemmons?

MRS. CLEMMONS: Yes.

THE COURT: Are you satisfied that she fully investigated it?

MRS. CLEMMONS: Yes.

THE COURT: Have you talked about this plea with your son?

MRS. CLEMMONS: Yes.

THE COURT: Are you satisfied that he understands what is going on today and he is not in any way emotional or fully impaired?

MRS. CLEMMONS: Yes.

THE COURT: He is okay?

MRS. CLEMMONS: Yes.

[33] THE COURT: Mr. Clemmons, are you satisfied that your son is aware of what is going on today?

MR. CLEMMONS: Yes, I am.

THE COURT: Have you discussed this with his lawyer?

MR. CLEMMONS: I did, with the understanding, with the exception of the second bill for possession of a weapon.

THE COURT: Are you satisfied that she has investigated the case properly and fully understands the case?

MR. CLEMMONS: Right.

THE COURT: Mr. Pace, are you satisfied with your lawyer?

THE DEFENDANT: Yes.

THE COURT: I want you to know this. Regardless of what you may have said before or regardless of what anyone has told you, you will be bound by the answers that you give today and by what you say today.

Do you understand that?

THE DEFENDANT: Yes.

[34] THE COURT: Do you understand that even though you are guilty, or may be guilty, you are presumed to be innocent.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In fact, you don't have to prove anything unless you choose to do that.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, you have the right to plead not guilty and have a trial before a Judge and a jury or before a Judge alone.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And by pleading guilty, you give up that right.

Is that clear?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, you do not have to admit anything.

Is that clear to you?

THE DEFENDANT: Yes.

THE COURT: The Commonwealth cannot [35] force you to testify and if you do not testify, that cannot be held against you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, and elect to be tried before a jury, that jury will consist of twelve persons from the community in which you live; Philadelphia, and you and your lawyer would participate in selecting the jurors.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In selecting the jurors, your lawyer, with your participation, could have excluded from the jury anyone who couldn't be a fair and impartial and unprejudiced juror.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There's an unlimited number of challenges for cause that your lawyer could, have.

Do you understand that?

[36] THE DEFENDANT: Yes.

THE COURT: Also, your lawyer would be entitled to a certain number of peremptory challenges.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: That means she could exclude from this jury for any reason whatsoever a certain amount of prospective jurors as proscribed by law.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, and you are tried, by a jury, which you and your lawyer would be able to participate in the selection of, you could not be found guilty unless and until all twelve jurors unanimously found you guilty.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that you may plead not guilty and be tried before a Judge, without a jury?

[37] Is that clear?

THE DEFENDANT: Yes.

THE COURT: In that event, the Judge would hear the evidence and decide whether you are guilty or not guilty.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, and have a trial, either before a Judge or a jury, you cannot be found guilty only if the Commonwealth proves you guilty beyond, a reasonable doubt.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, a reasonable doubt is that kind of a doubt that would restrain a reasonable person from acting or cause him to halt, hesitate or refuse to take action in a matter of highest importance to himself.

Is that clear to you?

THE DEFENDANT: Yes.

THE COURT Now, if you go to trial and plead not guilty, the Commonwealth must be present witnesses who would testify about the case.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And these witnesses would have to testify under oath and could be questioned or cross-examined by your lawyer.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, if you plead guilty, the Commonwealth may simply read a summary of what the witnesses would say if they were here and that means you are giving up your right to confront or question these witnesses.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand if you plead not guilty, and have a trial even though you do not have to

say anything or prove anything, you may testify at the trial, you may call witnesses to testify for you.

Do you understand that?

THE DEFENDANT: Yes.

[39] THE COURT: By pleading guilty, you give up these rights.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: By pleading guilty, Mr. Pace, you are saying; that you committed the acts that the Commonwealth says you did.

Is that clear?

THE DEFENDANT: Yes.

THE COURT: In other words, you give up your presumption of innocence, and your right to require the Commonwealth to prove your guilt beyond a reasonable doubt.

Is that clear to you?

THE DEFENDANT: Yes

THE COURT: When you plead guilty, Mr. Pace, you also give up your right [Illegible] evidence which may have been obtained from a search of your person or premises.

You also give up [illegible] question the admissibility of any statement you may have [illegible] police, and you also give up [40] your right to question the admissibility of

any identifications of you by any of the Commonwealth's witnesses.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In this case, if there is a statement, you would have a right to move to suppress that statement but if you plead guilty, you give up that right.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: When you plead guilty, Mr. Pace you are giving up your right to present evidence of any defense, justification or excuse as to your guilt.

Is that clear?

THE DEFENDANT: Yes.

THE COURT: Now, you understand if I accept this guilty plea, it will have the same effect as if you went to trial and were convicted.

Do you understand that?

THE DEFENDANT: Yes.

[41] THE COURT: When you plead guilty, you also give up virtually – you give up almost all your rights to appeal.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: When you plead guilty, you have no right to appeal except you can appeal whether your plea was voluntarily made.

You can appeal the question of the jurisdiction of the Court, and you can appeal the legality of the sentence which is imposed, but other than that, you can't appeal at all.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I wouldn't accept your plea if it weren't voluntarily given.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I understand from counsel that this is a plea to murder in the second degree and that the Commonwealth has agreed – that this is a plea to second degree murder and possession of instruments of a crime generally, [42] and the Commonwealth has agreed to nol pros the other bills and that there are no further agreements of any kind; is that correct?

MR. GALLAGHER: That is correct, your Honor.

THE COURT: Is that correct?

MS. DUNWORTH: That is correct, your Honor.

THE COURT: Now, you understand, Mr. Pace, that if you plead guilty, and I accept the plea, there are no negotiations or understandings and it will be up to me to sentence you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If I find, after hearing a summary of the offense and the circumstances, that I cannot accept this plea because I believe that there is sufficient evidence that warrants a trial on a more serious charge, such as first degree murder, then I will permit you to withdraw your plea, and you can be tried before a jury.

[43] Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If I find after hearing the summary that there is insufficient evidence to warrant a plea for murder of the second degree, I would permit you to withdraw your plea.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Has anyone threatened you to enter this plea?

THE DEFENDANT: No.

THE COURT: Has anyone forced you to do it?

THE DEFENDANT: No.

THE COURT: If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I will have no discretion to sentence you less than that.

Do you understand that?

THE DEFENDANT: Yes.

[44] THE COURT: And if you plead guilty to second degree murder, and you are found guilty of second degree murder, the sentence will be life imprisonment.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: With regard to possessing instruments of a crime, the maximum sentence for that is two and a half to five years in jail.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And I could, if I wish, impose that sentence in addition to the life imprisonment although I need not do that.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, murder in the second degree exists where the death occurs, where the death of the victim occurs, and in this case Randolph Baldwin is the victim, murder of the second degree is where the death of Randolph Baldwin occurred while you were engaged as the [45] perpetrator in the commission of or an attempt to commit robbery, and robbery is inflicting or threatening to

inflict or intentionally putting a victim in fear of immediate serious bodily injury when in the course of committing or attempting to commit a theft.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you admit that you committed that offense?

THE DEFENDANT: Yes.

THE COURT: Are you saying that you caused the death of Randolph Baldwin by striking him with a blackjack while you were robbing or attempting to rob him?

THE DEFENDANT: Yes.

THE COURT: Now, you know what the sentence could be. Do you still wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: At this point, ordinarily, I would ask the Commonwealth to summarize the evidence against the defendant with [46] respect to his guilt.

Before doing that, is there anything you want to say concerning the proceedings at this point, Miss Dunworth?

MS. DUNWORTH: No, I do not, your Honor.

THE COURT: Is there anything that either Mr. or Mrs. Clemmons want to say about the proceedings thus far?

MR. CLEMMONS: No, sir.

MRS. CLEMMONS: No.

THE COURT: Mr. Gallagher, you may present a summary of the evidence.

MR. GALLAGHER: Thank you, your Honor.

Your Honor, if the Commonwealth was to proceed to trial in this case, the Commonwealth would present the following witnesses and the following testimony.

Judge, so that you can follow, I have taken the liberty to make a copy of some or the statements that I would like to read into the record as well as the post mortem report.

[47] All of these items have been given to counsel as a result of her discovery request. Just so she knows what I am handing up to the Court, I will indicate that it is the statement of –

THE COURT: Why don't you mark them for identification so they can be a permanent part of the record.

You can start with C-1, because the other proceeding was really the motion and was a different proceeding.

MR. GALLAGHER: Yes, sir.

C-1 is a statement by Officer Leonard Little.

The statement was taken on the fourth of October, 1985.

THE COURT: Is it a statement of Officer Little or a statement of the defendant taken by Officer Little?

MR. GALLAGHER: It is a statement by Officer Little.

(Investigation Interview Record of Officer Leonard Little was marked Commonwealth [48] Exhibit C-1 for identification).

MR. GALLAGHER: C-2 is a statement by the defendant, John Pace, given to Detective Gerald Davis on September 18, 1985.

(Investigation Interview Record of John Pace, the defendant, was marked Commonwealth Exhibit C-2 for identification).

MR. GALLAGHER: C-3 is the post mortem report filed in this matter by the coroner.

(Post mortem report was marked Commonwealth Exhibit C-3 for identification).

MR. GALLAGHER: C-4 is a statement by the defendant, John Pace, given to Detective Rocks of the Homicide Division on Monday, September 30, 1985.

(Investigation Interview Record of John Pace, the defendant, was marked Commonwealth Exhibit C-4 for identification).

MR. GALLAGHER: Judge, if the Commonwealth were to proceed to trial, it would call initially a family member, and I would like to indicate for the record there are three family [49] members of the deceased in the courtroom, his wife, Maude Baldwin, his daughter, Beatrice Harwood, and his son, Randolph Baldwin are in the courtroom.

I would call on the family members and they would testify that on September 18, 1985, the deceased, Randolph Baldwin, was alive and living at 127 North

Conestoga Street in Philadelphia; that at that time, he was 56 years old; that at that time, approximately four in the morning, they would indicate although, your Honor, they do not live with him at that address, they would indicate it was his normal practice to leave early in the morning to proceed to work in Pascataway, New Jersey, and he would leave his house, walk to the elevated on Market Street, and proceed to take the train to Trenton and then get a ride to Pascataway, to report for work at 8:00 in the morning, so it was at that time that he was on his way to work.

The next witness I would call would be police officer Leonard Little and his statement has been marked as C-1.

[50] Your Honor, if I may, I would like to read his statement. It's not that lengthy, for the record.

Your Honor, police officer Leonard Little, badge number 3649, of the 18th district, would testify that on September 18, 1985, he was assignee to the 18th police district working radio patrol car 1819 on the midnight to eight a.m. tour of duty.

He would testify further that on September 18, 1985, at approximately 4:35 a.m., he was traveling east on Market Street and 53rd Street.

"I observed what I thought was a fight in front of the funeral home, which is located at 18 North 53rd Street in Philadelphia. The male, later found to be John Pace, had his hand out holding the man and he was striking the man with the other hand about the head.

"As I turned north on 53rd street, he, that is, the defendant, Pace, struck the man again and when he saw me, he began walking north on 53rd Street.

[51] "The man; that is, the deceased, had fallen to the ground. As Pace walked away, he threw something out of his right hand into a breezeway between houses at 24 and 26 North 53rd Street.

"I stopped Pace, and I placed him into my car, and I notified police radio of the incident. I backed up to the complainant, and he was on the ground and I noticed about three different marks on his head. He was laying on his back and his waist down was in the street and the upper part of his body was in the sidewalk. His head was facing in a southwest direction. He was semi-conscious and when I talked to him, he was incoherent.

"I called for fire rescue and they transported him to Presbyterian Hospital. While I was waiting for rescue, I went into the breezeway and I recovered a leather flat blackjack from the ground.

"I placed the blackjack on a property receipt and took it to the evidence custodian.

[52] "I went to Presbyterian Hospital to attempt to get a statement from the complainant but he was incoherent.

"The defendant, Pace, was transported to 18th district by emergency patrol wagon number 1803".

Judge, also today, Officer Little is here, and he has the blackjack if the Court would like to see it.

THE COURT: As a matter of fact, I think it ought to be marked.

MR. GALLAGHER: I wrote like to have it marked as C-5.

(Blackjack was marked commonwealth Exhibit C-5 for identification).

MR. GALLAGHER: Your Honor, the officer was asked "How many times did you observe John Pace strike Randolph Baldwin?"

The answer was "two or three times".

"Question: At any time, did Randolph Baldwin say anything to you either on the scene or in Presbyterian Hospital?

[53] "Answer: He was jabbering incoherently.

"Question: Can you describe any physical injuries which you observed on Baldwin after he was knocked on the ground?

"Answer: I saw what happened to be bruises on his head. He was dressed like he was going to work.

"Question: Did you observe anything on the ground on the scene where the incident took place?

"Answer: There was a small brown bag on the ground, about three or four feet from Baldwin to the south of him. I thought it might have been his lunch.

"Question: Did you observe any physical injuries to John Pace?

"Answer: Only that his jacket was ripped.

"Question: Were there any other witnesses to the incident besides yourself?

"Answer: No, but people came out after the incident".

[54] Judge, that would be basically the sum and substance of Officer Little's testimony.

Your Honor, I would then introduce the statement taken by detective Gerald Davis of West Detective Division at approximately 7:16 a.m., on the date of the incident, 9/18/85, from the defendant, John Pace, at West Detective Division inside the juvenile room at West Detective Division in the presence of the defendant's mother, Dorothy Clemmons.

After giving the defendant his Miranda rights, the following questions and answers were given:

"Question: John, would you tell me in your own words what caused you to be arrested this morning?"

Also, your Honor, prior to the statement, Detective Davis informed the defendant of what he was there for, why he was arrested and what he was charged with.

The answer by the defendant was as follows: "Well, I left my house last night about eleven p.m., and I went to Roger Lovette house at [55] 111 North 56th Street. When I left my house, I had a slapjack with me.

"About 4:25 a.m., I left Roger's house and I saw this old black man walk at 18 North 53rd Street. I decided to rob him, and I walked up to him and pushed him and he reached me and grabbed me. My blackjack fell out of my rear pocket, and I picked it up and hit him a couple of times on his head and he fell down.

"Just then a cop came up and arrested me".

As I indicated, that statement was given on September 18th, shortly after the arrest.

In addition, your Honor, I would move, via testimony or stipulation, as far as the examination done by the Medical Examiner's office.

The examination was done on September 29, 1985, 8:35 a.m.

Judge, there would also be testimony to the fact that the defendant – excuse me – the deceased was in Presbyterian Hospital [56] from the date of the incident, 9/18, until he expired on 9/28/85, and during the course of his treatment there, it is my information from the report from Presbyterian Hospital that he never regained consciousness.

Your Honor, the testimony from the Medical Examiner would indicate that the deceased was five feet four and one quarter inches, and he weighed 122 pounds; that the cause of death was craniocerebral injuries caused by a blunt instrument, and the manner of death was homicide.

Your Honor, I have also provided the Court with a full copy of the Medical Examiner's report which detailed the internal and external injuries that resulted in the death of the deceased.

Judge, finally, I would call Detective Edward Rocks of the Homicide Division, and he would testify as to the statement taken from the defendant after he was subsequently arrested on September 30th, due to the fact that the deceased had expired on September 28th.

Detective Rocks would testify to [57] the fact that the defendant was given his full Miranda rights in the presence of his mother, Dorothy Clemmons, that there was some time for the defendant and his mother to confer, that

after conferring, the defendant gave the following statement, and I will read the questions and answers into the record.

"John, I have showed you and your mother, Dorothy Clemmons, the copy of arrest warrant 140358, and you have been given your warnings.

"Can you tell me in your own words about the robbery and beating of Randolph Baldwin, 56 years old, on 9/18/85, at 4:35 a.m. hours on the highway at 18 North 53rd Street?

"Answer: On that night, I left my house at eleven something, and I went down 56th and Arch Street and I went to my friend's house. His name is Roger Lovette. I left there around 3:30 to walk home. I walked up Market Street and I turned up 53rd Street toward Arch Street.

"I saw the man walking towards Market Street on the same side of the street as [58] me. We were facing each other and we passed each other.

"When he passed me, he stopped and looked at me. I asked him what was he looking at. He told me to get out of here, that he knew what I was up to.

"I had the blackjack in my right back pocket and he swung at me. We was grabbing each other and I pushed him to the side and I hit him with it.

"I just hit him once and the police came up. I was going to rob him but I didn't take anything from him.

"Question: When you struck the man with the blackjack, what position was his body in?

"Answer: He was leaning over halfway on hi[illegible]e.

"Question: What part of the man's body did you strike with the blackjack?

"Answer: I hit him on the side of the head.

"Question: What did the man do when [59] you hit him in the head with the blackjack?

"He fell backwards and I started walking and that's when the cops came.

"Question: Can you describe the blackjack?

"Answer: It was a black leather flat slapjack".

The defendant was shown a slapjack by the detective, Detective Rock, and he stated it was the same type but his was bigger.

"Question: John, where did you get the slapjack?

"Answer: I got it that night from Roger Lovette because I had to walk home at 4:00 in the morning.

"Question: Why did the man swing at you.

"Answer: Because he thought I was going to rob him.

"Question: Can you describe the man that you struck with the slapjack.

"Answer: He was about my size and he had a hat on. He was wearing a tan coat and brown [60] pants on.

"Question: How much money did you have in your possession when you were walking home when this incident occurred?

"Answer: I didn't have any money.

"Question: John, do you remember having a conversation with Sergeant McDonnell on 9/18/85, at about 0500 hours inside the 18th district at 3500 Pine Street?

"Answer: Yes.

"Question: Do you remember what you told the Sergeant?

"Answer: I asked how the man was doing and I said I was sorry. I said that I didn't want to hit him. I just wanted some money.

"Question: Why did you hit the man with the blackjack.

"Answer: Because I thought he was going to hit me.

"Question: Did the man have anything in his hands of any kind or any kind of a weapon?

"Answer: He only had a little brown [61] paper bag in his hand.

"Question: When did you first see the police.

"Answer: When I started walking away.

"Question: John, after you struck the man with the slapjack, what did you do with the slapjack?

"Answer: I saw the police car coming and I threw it inside a yard.

"Question: Did you strike the man with your fist before you hit him with the slapjack?

"Answer: No. I grabbed him by his jacket and I threw him on the ground and when he was getting up, that's when I hit him with the jack.

"Question: Where does Roger Lovette live?

"Answer: He lives at 11 North Arch Street. Okay, let me tell you the truth. I got the blackjack earlier in the week and I went into somebody's car and took it. The Sunday before, [62] there was a small car around the corner with the window down. I went into the car and the blackjack was on the floor in the back. That's all I took [illegible]

"Question: Can you read, write and understand the English language?

"Answer: Yes.

"Question: [Illegible] the influence of alcohol or narcotics?

"Answer: [Illegible].

"Question: What was the last grade you completed in school?

"Answer: 9th grade.

"Question: Are you making this statement of your own free will and presence of your mother, Dorothy Clemmons?

"Answer: Yes.

"Question: Why are you making this statement?

"Answer: I want to get everything right and it is the truth".

Your honor, this statement was [63] signed by John Pace on 9/30/85, at 5:50 p.m., and it was also signed by Dorothy Clemmons, 9/30/85, at 5:30 p.m.

I would also add, point out the fact that the defendant is five eight and 147 pounds at the time of his arrest, on September 18, 1985.

With that, your Honor, the Commonwealth finishes its recitation of the facts.

THE COURT: Thank you very much.

Mr. Pace, you heard the summary presented by the Commonwealth; have you not?

THE DEFENDANT: Yeah.

THE COURT: Do you admit doing what the Commonwealth said you did?

THE DEFENDANT: Yes.

MS. DUNWORTH: Your Honor, may I speak with the parents of Mr. Pace just to go over one particular point that Mrs. Clemmons brought out to me?

THE COURT: Sure.

(Whereupon, an off the record [64] discussion was held among counsel and Mr. and Mrs. Clemmons).

MS. DUNWORTH: Very well, your Honor. Thank you.

THE COURT: You heard the summary. I believe you told me that what was presented is, in fact, the truth.

Is that correct?

MS. DUNWORTH: Yes.

THE DEFENDANT: Yes.

THE COURT: Is there anything else about this incident that you want to tell me?

THE DEFENDANT: That, you know, I didn't really mean to do it, what happened. I'm sorry. I'm sorry.

THE COURT: Well, unjustification, self-defense, could be a defense in this case.

Are you suggesting that you only did it out of self-defense or did you do it because you intended to rob him?

Now, I know you are sorry about it but did you intend to rob this man?

THE DEFENDANT: Yeah, I intended to [65] rob him but, you know, what happened wasn't meant to happen.

THE COURT: Again, are you admitting that the death of Randolph Baldwin occurred as a result of you striking him with the blackjack while you were attempting to rob him?

THE DEFENDANT: Yes.

THE COURT: Is there anything else you want to add?

THE DEFENDANT: No. That's all.

THE COURT: Do you have any questions about your plea of guilty?

THE DEFENDANT: No.

THE COURT: Do you understand what you are doing, Mr. Pace?

THE DEFENDANT: Yes.

THE COURT: Are there any questions that you have, Miss Dunworth?

MS. DUNWORTH: No, I don't, your Honor.

THE COURT: Do you have any further questions of this defendant?

MR. GALLAGHER: No, your Honor.

[66] THE COURT: I am satisfied that the Commonwealth's summary makes out the case that the defendant did, in fact, kill Mr. Baldwin with this blackjack while trying to rob him, which constitutes murder in the second degree.

I am satisfied that he is sorry for it, and I am also satisfied that he did it and he is admitting it.

I am addressing myself in those remarks to the defendant, his counsel and his parents, and I will hear from any of you. If anyone has anything to say about the plea, before I accept the plea, I do contemplate accepting the plea as voluntarily given.

Is there anything you want to say?

(No response).

THE COURT: Are you satisfied, Mr. Clemmons, that the defendant knows what he is doing and committed the crime?

MR. CLEMMONS: Yes. Right.

THE COURT: Are you, Mrs. Clemmons, that he knows what he is doing today and did commit the crime? Are you?

[67] MRS. CLEMMONS: Yes.

THE COURT: I am satisfied that the plea is voluntarily and intelligently made, and the guilty plea may be accepted.

The defendant may be arraigned.

THE CRIER: To this Bill of Information brought by the Commonwealth of Pennsylvania, County of Philadelphia, the District Attorney of Philadelphia County, by this information charges that on or about September 28, 1985, John A. Pace, on Bill of Information number 1275, October session, 1985, charging you with murder in the second degree, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: John A. Pace, on Bill of Information Number 1272, October session, 1985, charging you with possessing instrument of crime generally, to this bill of Information, what is your plea?

THE DEFENDANT: Guilty.

THE CRIER: Your Honor, John A. Pace has pleaded guilty to bill 1275 and bill 1272.

THE COURT: Thank you.

[68] Ordinarily, I would defer sentence and give counsel an opportunity to file motions for a new trial and arrest of judgment and order a pre-sentence and psychiatric.

In this case, however, since it is a guilty plea, since I am satisfied that it is voluntarily given, and since I have no discretion concerning the murder bill, unless there is

an objection from either counsel, it would be the intent of the Court to sentence the defendant at this time.

MS. DUNWORTH: There is no objection on the part of the defense, your Honor.

MR. GALLAGHER: No objection, your Honor.

THE COURT: Is there anything that you want to say before I sentence the defendant or anything you want to present now, recognizing my limitations.

MS. DUNWORTH: Your Honor, I would like to discuss with the Court, be it now or after sentencing, the placement of my client in a facility that would take into account his youth [69] and would generally help to rehabilitate him under whatever supervision is required, your Honor, but I think a place at Camp Hill would be, for the purposes of society at large and for the purposes of my client's interest, which would merge, I think Camp Hill would be a more appropriate place to send my client than a normal adult facility such as Graterford or a similar place closer to home.

THE COURT: Does the Commonwealth have any position regarding that?

MR. GALLAGHER: No, your Honor, I leave that to the discretion of the court as well as the correctional authorities.

MS. DUNWORTH: The Family had particularly asked me to present that request and to ask for the Court's recommendation that he be sent to a facility such as Camp Hill.

THE COURT: Is there anything further you want to present?

MS. DUNWORTH: No, your Honor.

THE COURT: Mr. Gallagher, is there anything you want to present? There is the P.I.C. [70] Bill, which the maximum is two and a half to five.

If there's anything you want to say or any members of the deceased's family that want to say anything, I will hear them.

MR. GALLAGHER: No, your Honor. The only thing is that, I think you are aware of it, because you heard the motion to decertify, but there were some previous juvenile offenses but that really doesn't have any bearing upon the sentence because my understanding, under the law, it is a mandatory sentence but I just point out to the Court that from my further inquiry today, there is an open robbery case in the juvenile court jurisdiction, which I think may be resolved after the Court enters the sentence today, if the Court so enters in accordance with the law.

I want the Court to be aware of that, that there is an open robbery case in juvenile Court.

MS. DUNWORTH: For the purposes of sentence, your Honor, I don't believe that that should affect this Court.

[71] THE COURT: I am satisfied. In any event, it won't affect me except to the extent that it can be disposed of after this sentence.

MS. DUNWORTH: With regard to the P.I.C., I would ask the Court to consider merging with whatever sentence your Honor gives, which is a mandatory sentence.

THE COURT: You are asking that it be concurrent?

MS. DUNWORTH: Yes, sir.

THE COURT: I will consider that as well.

Is there anything you want to say, Mr. Pace?

THE DEFENDANT: Just to tell his family that I am sorry, you know, what happened. That's all.

THE COURT: I am convinced that right now, as you sit before me, you are, but we can't change what happened, and I am bound by law to impose a sentence which is required by the crime that you have pled guilty to.

So the sentence of the Court on [72] Bill of Information October, '85, Number 1275, in which the defendant has pled guilty to murder in the second degree, is life imprisonment.

With respect to the charge of possessing instruments of a crime, the sentence of the Court is not less than one nor more than two years to run concurrent, so that will not be in addition to but can be served at the same time as the sentence of life imprisonment.

With regard to counsel's request, I surely will recommend and make part of the sentencing order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help

toward rehabilitation, particularly since he is a young man and at some time in the future, may be subject to release and it is hoped that the prison sentence, for whatever duration it be, certainly aid him in rehabilitating him.

The reasons for the sentence are they are mandated by law. I don't know that there's anything else that the Court can say.

You have ten days to file a [73] petition to reconsider. I will not reconsider.

You have 30 days to appeal to the Superior Court. Miss Dunworth, if the appeal under some of the limited grounds are warranted, you are directed, as court appointed counsel, to pursue that matter.

Is there anything else anybody wants to say?

MR. GALLAGHER: Your Honor, so the record is clear, the defendant does have and counsel on his behalf, has ten days to withdraw the guilty plea and/or ask the Court to reconsider.

As the Court has already indicated, there is really no leeway for the Court to reconsider because the sentence is mandated by the crime to which the defendant has pled guilty.

THE COURT: I think he has ten days in which he can ask me to withdraw the guilty plea. I think that's correct.

MR. GALLAGHER: Do you understand that, Mr. Pace?

THE DEFENDANT: I understand.

[74] THE COURT: The sentence has been imposed.

If there's nothing further, we will recess this case.

MR. GALLAGHER: Your Honor, so the record is complete, the Commonwealth would move at this point to nol pros bills 1274 and 1273, the reason being that the sentences would merge if the defendant had pled guilty on all the bills, and that is the purpose for the Commonwealth's motion for nol prossing those two bills.

THE COURT: Also, I think the second count of 1272, which is P.I.C. Weapon, ought to be nol prossed.

MR. GALLAGHER: Yes, sir.

THE COURT: Thank you very much.

MR. GALLAGHER: Thank you, your Honor.

Judge, I ask that the blackjack be returned to the police evidence room.

THE COURT: It may be returned there.

- - -

[75] (Whereupon, the hearing was concluded).

- - -

PETITION UNDER
POST CONVICTION HEARING ACT

COMMONWEALTH OF PENNSYLVANIA	COURT AND DOCKET NUMBERS
VS	Cp# 1275

Mr. John Pace
(Name of Petitioner) To be filled in by Clerk by Court

NOTE: List below those informations or indictments & offenses for which you have not completed your sentence.

INFORMATION OR INDICTMENT NUMBERS:

CP #1275

85-10-1272

I WAS CHARGED WITH THE FOLLOWING CRIMES:

Homocide Robbery.

1. MY NAME IS:

   Mr. John Pace

2. I AM NOW

   (A) ☐ On Parole (B) ☐ On Probation
   (C) ☒ Confined in SCI. Camp Hill, Pa.

3. I WAS SENTENCED ON February 13, 19 86 TO A TOTAL TERM OF Life, COMMENCING ON September 30, 19 85, FOLLOWING A

   ☐ Trial by Jury

   ☐ Trial by a judge without a jury

   ☒ Plea of guilty

   ☐ Plea of nolo contendere

4. I AN ELIGIBLE FOR RELIEF BECAUSE OF:

* * *

☒ The introduction of a coerced confession into evidence

* * *

☒ The infringement of my privilege against self-incrimination under either federal or state law

☒ The denial of my constitutional right to representation by a competent lawyer

☒ A plea of guilty unlawfully induced

* * *

5. THE FACTS IN SUPPORT OF THE ALLEGED ERROR(S) UPON WHICH THIS PETITION IS BASED ARE AS FOLLOWS: (State facts clearly and fully; argument, citations, or discussions of authorities shall not be included.)

(A) I know the following facts to be true of my own personal knowledge:

In this particular case I was represented by incompetent counselor, and I was induced by counselor to plead guilty, without having the full understanding of my constitutional rights. And what they entailed. I also was induced at the Police Administration Bldg, with respect to giving a confession. Amd was not abreast of my Fifth Amendment right. Of the Constitution of the United States.

(B) The following facts were made known to me by means other than my own personal knowledge (Explain how and by whom you are informed):

Doing reasearch in the prison law clinic, and personal reading.

(C) In the event my appeal is allowed as requested under #4, the following are the matters which I intend to assert on that appeal (Specify the matters to be asserted if appeal is allowed)

The introduction of a coerced confession into evidence. The infringement of my privilege against self incrimination under either federal or State law.

The denial of my constitutional right to representation by competent lawyer. A plead of guilty unlawfully induced.

6. SUPPORTING EXHIBITS

(A) In support of this petition I have attached as exhibits:

☐ Affidavits [Exhibit(s) No._____]

☐ Records [Exhibit(s) No._____]

☐ Other Supporting Evidence [Exhibit(s) No._____]

(B) I have not attached any affidavits, records or other supporting evidence because

I do not have any in my possession.

7. I HAVE TAKEN THE FOLLOWING ACTION(S) TO SECURE RELIEF FROM MY CONVICTION(S) OR SENTENCE(S):

(A) Direct Appeal (If "YES," name the court(s) to which appeal(s) was/were taken, date, term and number, and result.)

☐ YES ☒ NO

(B) Previous proceedings in the courts of the Commonwealth of Pennsylvania (If "YES," name the type of proceedings (such as habeas corpus, etc.) – including former proceedings under the Post Conviction Hearing Act the Court(s) in which petition(s) was/were filed, date, term and number, and result, including all appeals.)

☐ YES ☒ NO

(C) Habeas Corpus or other petitions in Federal Courts (If "YES," name the district in which petition(s) was/were filed, date(s), Court Number – civil action or miscellaneous, and result including all appeals.)

☐ YES ☒ NO

(D) Other legal proceedings (If "YES," give complete details – type of action, court in which filed, date, term and number, and result, including all appeals.)

☐ YES ☒ NO

8. FOLLOWING MY ARREST, I WAS REPRESENTED BY THE FOLLOWING LAWYER(S): (Give the lawyer's name and the proceeding at which he represented you.)

I have no knowledge of who she was, all I know is that she represented my case from the beganing to the end, and that was the plead of guilty.

9. THE ISSUES WHICH I HAVE RAISED IN THIS PETITION HAVE NOT BEEN FINALLY LITIGATED OR WAIVED BECAUSE: (State facts.)

Prior to this petition being filed I had no knowledge of the law, so therefore I did not know what to file. Now that I have presented some law to the courts I hope these matters can be litigated.

10. BECAUSE OF THE FOREGOING REASONS, THE RELIEF WHICH I DESIRE IS:

(A) ☐ Release from custody and discharge

(B) ☒ A new trial

(C) ☐ Correction of sentence

(D) ☐ Other relief (specify): _____

11. (A) I am ☐ ABLE ☒ NOT ABLE to pay the costs of this proceeding

I have $__0__ in my prison account.

(B) My other financial resources are: Parents

12. (A) ☒ I do not have a lawyer and I am without financial resources or otherwise unable to obtain a lawyer.

(1) ☒ I request the court to appoint a lawyer to represent me.

(2) ☐ I do not want a lawyer to represent me.

(B) ☐ I am represented by a lawyer. (Give name and address of your lawyer)

/s/ John A. Pace
(Signature of Petitioner)

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF CUMBERLAND :

Personally appeared before me a notary public in and for said County and Commonwealth

/s/ John A Pace
(Name of Petitioner)

who, being duly sworn [or affirmed] according to law, deposes and says:

That he is the petitioner herein and the facts as set forth in this petition are true and correct to the best of his knowledge, information and belief.

/s/ John A. Pace
(Signature of Petitioner)

Sworn to and subscribed before me this

5th day of August, 1986

/s/ Steven G. Wetzler
(Notary Public)

Steven G. Wetzler Notary Public Lower Allen Twp. Cumberland Co. My Expiration Expires Apr. 10, 1989

COMMONWEALTH OF PENNSYLVANIA VS	IN THE CRIMINAL COURTS OF THE COUNTY OF
(Name of Petitioner)	Criminal Action No. _____ of ____ 19____

ORDER

AND NOW this _____ day of _____, 19_____
Upon consideration of the foregoing petition:

1. ☐ Petition is returned to petitioner for amendment as follows, such amendment to be made on or before _____, 19_____

2. ☐ A rule is granted upon the Commonwealth of Pennsylvania to show cause why a hearing should not be granted. The rule is returnable on or before _____, 19_____

3. ☐ The request to proceed as a poor person, without the payment of costs, is ☐ granted ☐ denied.

4. ☐ Upon finding that petitioner is unable to obtain a lawyer _____ Esq., is appointed to represent him.

5. ☐ The Clerk of this Court is ordered and directed to do the following forthwith:

(a) To serve a copy of this petition and this order upon the District Attorney of _____ County.

(b) To send a copy of this petition and this order to _____ Esq., the lawyer for the petitioner.

(c) To send a copy of this order to the petitioner.

6. ☐ _____ J.

_____

FRANKLIN D. GREEN, Esquire Attorney for Petitioner
Identification No. 15146
933 East Wadsworth Avenue
Philadelphia, Pa. 19150
(215) 242-1531

IN THE COURT OF COMMON PLEAS
FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: CRIMINAL TRIAL DIVISION
-vs-	: OCTOBER TERM, 1985
JOHN A. PACE	: NO. 1272, MURDER

AMENDED PETITION UNDER
POST CONVICTION HEARING ACT

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Your petitioner, JOHN A. PACE, by his attorney, files this Amended Petition in conformance with the Post Conviction Hearing Act: 19 P.S. § 1180-1 et seq.; and in support thereof, states as follows:

1. Petitioner had a Decertification Hearing before the Honorable David N. Savitt on February 13, 1986 in Courtroom 602, City Hall, Philadelphia, Pennsylvania.

2. Following the Court's denial of the Motion to Decertify, petitioner, also on February 13, 1986, entered into a plea of guilty to murder in the second degree and was sentenced to life imprisonment by Judge Savitt.

3. Petitioner has filed a Petition under the Post Conviction Hearing Act to secure relief from conviction and sentencing.

4. Petitioner is presently incarcerated in the State Correctional Institution at Camp Hill, Pennsylvania.

5. On or about August 21, 1986, petitioner filed a Petition under the Post Conviction Hearing Act, alleging:

(a) Ineffective assistance of counsel.

(b) The abridgement of rights guaranteed by the Constitution or laws of this Commonwealth, or by the Constitution of the United States, being rights not afforded petitioner at the time of his trial.

6. That in support of this Amended Petition, petitioner believes and therefore avers that:

(a) Moira Dunworth, Esquire, Trial Counsel for petitioner did not render effective of counsel in that:

(I) Trial Counsel failed to seek a suppression of my alleged confession.

(II) Trial Counsel failed to fully explain to me the effect of my pleading guilty to murder in the second degree.

WHEREFORE, your petitioner prays that the Honorable Court grant leave for the presentation of testimony in this matter and those raised in petitioner's original petition, upon receipt thereof, grant petitioner relief in accordance with the Post Conviction Hearing Act, to wit: Grant petitioner a new trial.

/s/ Franklin D. Green
FRANKLIN D. GREEN

VERIFICATION

I, FRANKLIN D. GREEN, Esquire, hereby state:

1. I am the attorney for JOHN A. PACE, petitioner in the attached Amended Petition Under Post Conviction Hearing Act.

2. I verify that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief; and

3. I understand that the statements made herein are subject to the penalties of 18 Pa.C.S.Sec. 4904 relating to unsworn falsification to authorities.

/s/ Franklin D. Green
FRANKLIN D. GREEN, Esquire

Date March 11, 1987

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
V.	:	
JOHN PACE	:	NO. 1272 (P.C.H.A.)

COMMONWEALTH'S MOTION TO DISMISS
OR COMPEL SPECIFIC PLEADING OF
DEFENDANT'S P.C.H.A. PETITION

TO THE HONORABLE, THE JUDGE OF THE SAID COURT:

RONALD D. CASTILLE, District Attorney of Philadelphia County, by his Assistant, RICHARD E. MILLER, Motions Unit, in support of the Commonwealth's Motion to Dismiss or Compel Specific Pleading of defendant's petition under the Post Conviction Hearing Act (hereinafter P.C.H.A.), respectfully represents the following:

I. STATEMENT OF THE CASE

1. On February 13, 1986, defendant pled guilty to second degree murder. He was sentenced to life imprisonment.

2. Defendant has filed an amended P.C.H.A. petition, alleging the following claims for relief:

a) Trial counsel was ineffective for failing to "fully explain" to defendant the effect of pleading guilty to second degree murder.

b) Trial counsel was ineffective for failing to move to suppress defendant's confession.

3. By way of an answer, the Commonwealth denies that trial counsel was ineffective in the manner alleged.

II. MOTION TO DISMISS OR COMPEL SPECIFIC PLEADING

Both of defendant's claims are bald assertio unsupported by any factual allegations. Absent specific pleading, defendant's petition must be dismissed. *Commonwealth v. Pettus,* 424 A.2d 1332 (Pa. 1981).

Defendant's guilty plea claim (claim "a") is refuted by the record. He was colloquied before entering his plea and he indicated that he fully understood what he was doing. *See* N.T. 2/13/86 at pp. 30-46. Defendant's claim is clearly refuted by the record and must be dismissed. *Commonwealth v. Cappelli,* 489 A.2d 813 (Pa. Super. 1985).

Defendant's suppression claim (claim "b") is not legally cognizable. *See Commonwealth v. Casner,* 461 A.2d 324 (Pa. Super. 1983) (where defendant pleads guilty, P.C.H.A. issues are very limited). Defendant's suppression claim does not fall into the category of cognizable "guilty plea claims." Therefore, it must be dismissed.

WHEREFORE, the Commonwealth requests this Court to dismiss defendant's petition under the Post Conviction Hearing Act and order specific pleading of those claims not dismissed.

Respectfully submitted,

RONALD D. CASTILLE
District Attorney

By: /s/ Richard E. Miller
RICHARD E. MILLER
Assistant District Attorney
Motions Unit

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
V.	:	
JOHN PACE	:	NO. 1272 (P.C.H.A.)

ORDER

AND NOW, this ___ day of ___, 1987, upon consideration of the Commonwealth's Motion to Dismiss or Compel Specific Pleading, defendant shall be required to specifically plead the following allegations.

1. Specify how defendant was prejudiced by counsel's failure to move to suppress his confession and how counsel was ineffective in this manner.

2. Specify how counsel was ineffective in explaining to defendant the effect of pleading guilty to murder and how defendant was prejudiced.

Failure to comply with this Order within ten (10) days will result in dismissal of defendant's Post Conviction Hearing Act petition.

BY THE COURT:

/s/ O'Keefe
J.

FRANKLIN D. GREEN, Esquire Attorney for Petitioner
Identification No. 15146
933 East Wadsworth Avenue
Philadelphia, Pennsylvania 19150
(215) 242-1531

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
-vs-	:	PHILADELPHIA COUNTY OCTOBER TERM, 1985
JOHN A. PACE	:	NO. 1272 (P.C.H.A.)

ANSWER TO COMMONWEALTH'S MOTION TO DISMISS

1. But for the confession the case against John Pace, petitioner above, was weak at best, petitioner was a minor at the time of the incident and was also intoxicated.

Here a statement was taken from petitioner by the police in violation of Mr. Pace's rights as a minor under Pennsylvania law.

Further, petitioner, because of his intoxicated state, was incapable of giving a voluntary, intelligent and knowing statement to the police. This could have been confirmed by the results of the blood test taken at the YSC on or about September 18, 1985.

2. Petitioner feels trial counsel did not make clear to him that by his pleading guilty to second degree murder he would receive a mandated sentence of life imprisonment but instead implied that the sentence could be less than life imprisonment and probably would be.

Respectfully submitted,

/s/ Franklin D. Green
FRANKLIN D. GREEN

VERIFICATION

I, FRANKLIN D. GREEN, Esquire, hereby state:

1. I am the attorney for JOHN PACE, Petitioner in the foregoing Answer to Commonwealth's Motion to Dismiss.

2. I verify that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief; and

3. I understand that the statements made herein are subject to the penalties of 18 Pa.C.S.Sec. 4904 relating to unsworn falsification to authorities.

/s/ Franklin D. Green
FRANKLIN D. GREEN, Esquire

Date January 3, 1988

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL MOTIONS DIVISION

- - -

COMMONWEALTH	:	OCTOBER TERM, 1985
-vs-	:	
JOHN A. PACE	:	NO. 1272

- - -

PCHA

MOTION TO DISMISS

- - -

January 11, 1988

Courtroom 788, City Hall

Philadelphia, Pennsylvania

- - -

BEFORE: THE HONORABLE JOSEPH D. O'KEEFE, J.

- - -

APPEARANCES:

PETER KENNEDY, ESQUIRE
Assistant District Attorney
For the Commonwealth

FRANKLIN D. GREEN, ESQUIRE
Court-Appointed Attorney
For The Petitioner

[1] THE COURT CRIER: Number 6, Your Honor, John Pace.

THE COURT: They are going to argue their motion now.

MR. GREEN: Okay.

MR. KENNEDY: Your Honor, on February 13, 1986, the defendant John Pace pled guilty to second degree murder before Judge David Savitt. Judge Savitt accepted the plea after a full colloquy and Sentenced the defendant to life imprisonment.

On March 31st of 1987 the defendant filed an amended petition alleging that counsel Moira Dunworth was ineffective for two grounds.

THE COURT: What was the date?

MR. KENNEDY: March 31st, 1987, the amended petition.

Again, counsel was ineffective is the allegation for – on two grounds, that counsel at the time of the plea colloquy was Moira Dunworth.

Now the first basis for trial counsel's ineffectiveness was counsel failed to seek suppression of the defendant's statement or confession after he was arrested. Now the basis of the Commonwealth's motion to dismiss is that at the plea colloquy on page 39, the notes of testimony, [2] the defendant expressly waived his right to suppress evidence including his statement to the police during the colloquy. So that claim, Your Honor, is waived by defendant.

The second basis for ineffectiveness was counsel failed to explain to Mr. Pace the effect, the full effect of pleading guilty. Now more specifically Mr. Green in his supplemental petition alleges that counsel did not make clear to her

client that defendant would receive a mandatory life imprisonment sentence if the judge accepted the plea agreement. I would refer Your Honor to page 43 of the notes of testimony where the Court states, "If I find you guilty or if I accept the plea to second degree murder you must know that the sentence is life imprisonment.

The Court further states, "I will have no discretion to sentence you to less than that. Do you understand that?"

The defendant answers yes. So that claim is refuted by the record, Your Honor. I would ask Your Honor to therefore not order an evidentiary hearing and order the amended petition be denied. Thank you.

THE COURT: Do you want to rest on the record [3] or –

MR. GREEN: No, Your Honor, I would like to further clarify the first point, and that is that this whole case was based, the petitioner feels that this whole case rests on whether or not the alleged confession was suppressed or not. That was the Commonwealth's case. And the failure to even seek a suppression caused the guilty plea to come up and that the defendant/petitioner did not intelligently, knowingly and voluntarily plead guilty because he did not know at that time the effect of waiving his right to a suppression hearing, which was the whole case. He was under 18 at the time, there was no proper waiver of that right. He was intoxicated on drugs and/or alcohol at the time. There are facts that exist that would tend to indicate had suppression been sought it would have been a successful suppression.

THE COURT: I understand the issues, Mr. Green. I will hold this under advisement.

MR. KENNEDY: Thank you, Your Honor. I would move the Quarter Sessions file into evidence.

THE COURT: All right, thank you.

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ [Illegible]
Official Stenographer

Feb. 9, 1988
DATE

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

_____
Judge

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 Arch Street
PHILADELPHIA, PENNSYLVANIA 19102

RONALD D. CASTILLE
DISTRICT ATTORNEY

January 29, 1988

Honorable Joseph D. O'Keefe
532 City Hall
Philadelphia, Pennsylvania 19107

Re: Commonwealth v. John Pace
C.P. 85-10-1272-75 (P.C.H.A.)

Dear Judge O'Keefe:

On January 11, 1988, the Commonwealth requested the Court to deny P.C.H.A. relief in the above-captioned case without proceeding to an evidentiary hearing. The matter was held under advisement. Since defendant's answer to the Court's order of more specific pleadings was not received until January 11, 1988, the day the motion was heard, the Commonwealth takes this opportunity to clarify its position.

Defendant has alleged that counsel, Moira Dunworth, Esquire, rendered ineffective assistance of counsel and, in support, points out that counsel failed to seek suppression of a confession before advising her client to plead guilty. In *Commonwealth v. Marsh,* 333 A.2d 181 (Pa. 1975), the Supreme Court of Pennsylvania held that a petitioner who has pled guilty must allege three things before relief under the Post Conviction Hearing Act should even be considered: (1) the existence of constitutionally infirm evidence; (2) the guilty plea was motivated by the same evidence; and (3) on what grounds the evidence would have been suppressed. *Id.* at 182. Although defendant has alleged in his supplemental petition that a statement given to the

police on September 18, 1985 was involuntarily given, the record demonstrates that defendant gave a second statement after the victim died which was just as damaging as the first.

On September 30, 1985, defendant corroborated his earlier confession, reiterating that it was his intent to rob the victim. N.T. 2/13/86, pp. 48, 58. Defendant also explained to Judge Savitt during the colloquy that it was his clear intent to rob the victim. *Id.* pp. 64-65. The record makes clear that the evidence against defendant, even excluding the first confession, was overwhelming and, therefore, defendant cannot reasonably maintain now that his plea was involuntary. Under *Marsh,* relief should be denied.

Thank you for your further consideration of this matter.

Very respectfully yours,

/s/ Peter C. Kennedy
PETER C. KENNEDY
Assistant District Attorney
Motions Unit

PCK:ec

cc Franklin D. Green, Esquire
P.C.H.A. Unit

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
VS.	:	
JOHN PACE	:	NO. 1272

ORDER

O'KEEFE, J.

AND NOW TO WIT, this 25th day of July, 1988 it is hereby *ORDERED AND DECREED* that the Commonwealth's Motion to Dismiss the defendant's Petition for Relief under the Post Conviction Hearing Act is *DENIED.*

It is further *ORDERED AND DECREED* that an evidentiary hearing be conducted on November 15, 1988 to address the claims raised in the defendant's Amended Petition for Relief.

BY THE COURT:

/s/ O'Keefe
J.

DAVID RUDENSTEIN
ATTORNEY AT LAW
ATTY. I. D. 33023
~~3140 PSFS BUILDING~~
~~12 S. 12TH ST.~~
~~PHILADELPHIA, PA 19107~~
~~(215) 928-1155~~

ATTORNEY FOR DEFENDANT
SUITE 1100
1420 WALNUT STREET
PHILADELPHIA, PA 19102
(215) 790-9422

Plaintiff COMMONWEALTH OF PENNSYLVANIA *vs.* *Defendant* JOHN PACE	COURT OF COMMON PLEAS OF PHILADELPHIA CRIMINAL TRIAL DIVISION ~~*Docket No.*~~ October Term, 1985 No. 1272 ~~*CIVIL*~~ *ACTION* CRIMINAL

AMENDED P.C.R.A. PETITION

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The defendant, John Pace, by and through his court appointed attorney, David Rudenstein, hereby files this amended petition in accordance with the Post Conviction Relief Act and, in support of same, states:

1. The defendant, having previously been charged with murder and related offenses was assigned to Judge Savitt for trial on or about February 13, 1986. At that time, the defendant entered a plea to murder in the second degree and thereafter, and on that same date, was sentenced to mandatory life in prison.

2. At trial, the defendant was represented by Moira Dunworth, Esquire.

3. No direct appeal was taken.

4. On or about August 21, 1986, the defendant filed a petition under the Post Convicition Hearing Act. Thereafter, apparently, Franklin D. Green, Esquire was appointed to represent Mr. Pace in this matter. Apparently, said counsel filed an amended petition on March 31, 1987 alleging that trial counsel was ineffective on two grounds. To wit that she failed to seek suppression of defendant's statement and that she failed to fully explain the effect of pleading guilty.

5. Thereafter, a motion to dismiss hearing was held in P.C.H.A. Court, room 788, City Hall on January 11, 1988 before the Honorable Joseph D. O'Keefe. At that time, this matter was taken under advisement and the Court file does not reflect any decision.

6. Subsequently, and frankly, for reasons not totally known to this counsel, I was appointed to represent Mr. Pace.

7. The defendant was denied his rights to due process and to a fair trial under the United States Constitution and the Pennsylvania Constitution to such an extent as to make his court proceedings fundamentally unfair, requiring a new trial and, more specifically, the defendant's constitutional rights were violated as he was without effective assistance of counsel at the trial level and, more specifically:

a. Trial counsel was ineffective for failing to properly present reasons in support of her pretrial application to remand this matter to family court. On February 13, 1986, at page 9 of the transcript, the Court informed counsel that once a prima facie case of murder was shown, the

criminal court has exclusive jurisdiction and the burden is on the defendant to show that his case does not belong in criminal court. The Court gave trial counsel an opportunity to produce more evidence, but, she indicated that she had no such evidence. Trial counsel failed to produce any psychological evaluation and failed to produce testimony from the defendant or his family. In that the defendant had no prior convictions and in that he had a good school report from the Youth Study Center, the psychological evaluation could have demonstrated that he was well adjusted and perhaps could have concentrated on the aberrant behavior, to wit, the crime in question.

b. Trial counsel was ineffective for failing to insist that pre-trial motions to suppress defendant's out-of-court statements be held prior to the time any guilty plea was entered. Defendant gave two statements, the first of which was inculpatory and which was given within several hours of his actual arrest. At page 8 of the transcript, it is indicated that, at the time of the arrest, defendant was intoxicated and presumeably was intoxicated at the time he gave his initial inculpatory statement. The second statement, which was taken 12 days later would be fruit of the poisonous tree and equally suppressible. In that the defendant was a minor; in that he had no prior criminal record and in that there were no arguable aggravating factors, this was not a death penalty case and, hence, the defendant had absolutely nothing to lose by having litigated his pre-trial motions first. The sentence for first degree and second degree murder would have been the same, to wit, mandatory life in prison and, in effect, the defendant received absolutely nothing

in exchange for his guilty plea. Competent counsel could never have suggested this course of action when, in fact, the initial culpatory statement was taken while the defendant was intoxicated.

c. Trial counsel was ineffective for failing to fully explain the ramifications of the guilty plea to defendant. It is true that Judge Savitt, at page 43, indicated to the defendant that he had no discretion and that the sentence was mandatory life. However, the Judge later, at page 72, made certain remarks to the defendant which certainly would have left any reasonable person and, certainly, a 17 year old in serious doubt as to the consequences of his plea. The Court said:

> "With regard to counsel's request, I surely will recommend and make part of the sentencing Order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward *rehabilitation*, particularly since he is a young man and, at *some time in the future, may be subject to release* and it is hoped that the prison sentence, for *whatever duration it be*, certainly aid in rehabilitating him" (my emphasis).

No where on the record did Judge Savitt or defendant's attorney explain that the Judge was in error when he indicated that the defendant might be subject to release, as Pennsylvania has no good time credits and, further, a life sentence is life in Pennsylvania unless a governor would issue a pardon. Any reasonable person and, certainly a 17 year old with no prior record, would have taken the Judge's comments to mean that, although he was receiving a life sentence, he

could be parolled in the future. This, as we all know, is not true and it was patently ineffective of his counsel to have not pointed this out to defendant. The Court can take judicial notice of the fact that the media – more the national than the local media – is always complaining about life sentences not being life sentences and many people, even in this Commonwealth, believe, mistakenly, that someone who commits a murder and pleads to a life sentence can be and will be parolled.

d. The defendant received ineffective assistance of counsel in that defense counsel should have advised defendant not to plead guilty to second degree murder. As indicated above, the obvious sentence on a first degree murder charge would have been life imprisonment. The sentence was the same for second. Obviously, trial counsel felt that she had a viable defense to second degree murder. At page 15-16 of the transcript, trial counsel said:

> "Mr. Baldwin (victim) apparently said something to my client, such as 'What are you doing?', or something to that effect. My client said 'What do you mean?'. He said, 'I know what you're up to'; that is Mr. Baldwin.
>
> Mr. Baldwin, according to the statement, reached out to my client. My client had a blackjack in his pocket.
>
> He hit Mr. Baldwin with the blackjack. He did not rob Mr. Baldwin. There is certainly an intimation that my client may have contiplated that, at least

> according to the statements. There were two statements.
>
> My client walked away from Mr. Baldwin and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.
>
> I think it significant, Your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fist fight was insuing, so it's a very ticklish question as to when the intent to rob occurred."

It is obvious from trial counsel's own mouth that she believed that she had a viable defense to the charge of murder two. Obviously there was no getting around murder three, but the sentence for murder three would have been substantially less than the sentence for murder two. Moreover, this counsel would assert that we have to be practical in analyzing counsel's actions and, in the City of Philadelphia, most experienced criminal practitioners know that their client, and certainly a client in these circumstances would never have received a death penalty from a judge sitting alone, such as Judge Savitt, and furthermore, an experienced trial practitioner would have known that they at least had a shot of coming in with a third degree in front of a judge like Judge Savitt who everyone knows has "reasonable doubt" and who is a judge that many attorneys will waive a jury in front of for that reason.

The actions or inactions of trial counsel certainly mandate a new trial for ineffectiveness as set down in *United States vs. Strickland* and *Commonwealth vs. Maroney.*

Counsel, at this time has chosen to file this amended petition as some degree of time has passed since accepting the appointment. However, the defendant has been incarcerated at Camp Hill, and because of the recent problems there, counsel has been unable to visit with defendant. Counsel respectfully requests leave of Court to supplement this amended petition after he has had a reasonable opportunity to confer with his client. A "bring down" is scheduled for December 18, 1989.

Respectfully submitted by:

/s/ David S. Rudenstein
David S. Rudenstein, Esquire,
Attorney for defendant

[Dated 11/29/89]

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
v.	:	
JOHN PACE	:	NOS. 1272-1275 (P.C.R.A.)

COMMONWEALTH'S MOTION TO DISMISS

TO THE HONORABLE, THE JUDGE OF THE SAID COURT:

RONALD D. CASTILLE, District Attorney of Philadelphia County, by his Assistant, NEIL T. MURRAY, respectfully represents:

1. Defendant in the above-captioned case entered a guilty plea to Murder in the Second Degree and Possessing an Instrument of Crime before the Honorable David N. Savitt on February 13, 1986. Judge Savitt sentenced defendant to life imprisonment.

2. Moira Dunworth, Esquire represented defendant at the guilty plea and sentencing.

3. Defendant took no direct appeal.

4. Defendant received new counsel, Franklin Green, Esquire, and filed his first petition for relief under the Post Conviction Hearing Act. On January 11, 1988, the Honorable Joseph D. O'Keefe held the Commonwealth's motion to dismiss under advisement. Without explanation, there has been no ruling on this motion.

5. Defendant now has new counsel and has filed a second petition for relief under the Post Conviction Hearing Act alleging ineffective representation by trial counsel. Counsel is presumed effective. To warrant relief, defendant must demonstrate that counsel's ineffectiveness worked to his prejudice. *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). Counsel will not be considered ineffective for failing to assert a meritless claim. *Commonwealth v. Unger*, 494 Pa. 592, 598, 432 A.2d 146, 149 (1980); *Commonwealth v. McGeth*, 347 Pa. Super. 333, 346, 500 A.2d 860, 862 (1985). The Supreme Court has held that claims made in a vacuum cannot be supported, cannot provide grounds for relief and must be dismissed. *Commonwealth v. Silo*, 509 Pa. 406, 502 A.2d 173, 176 (1985); *Commonwealth v. Pettus*, 492 Pa. 558, 563, 424 A.2d 1332, 1335 (1981). At the very minimum, defendant's claims; fail to conform to the specificity requirements of the Post Conviction Hearing Act.

Defendant initially alleges counsel ineffective for failing to offer additional evidence at the decertification hearing to have defendant tried as a juvenile. This claim is not cognizable under the Post Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. §9543(3). A claim is not cognizable under the Post Conviction Hearing Act unless it is of constitutional dimension. *Commonwealth v. Betrand*, 484 Pa. 511, 523, 399 A.2d 682 (1979). In the instant case, defendant is not challenging his conviction nor his sentence under due process grounds. Moreover, when a defendant enters a guilty plea, the only legally cognizable issues in a post conviction proceeding are those which affect either the voluntariness of the plea or the legality of the sentence. *Commonwealth v. Casner*, 315 Pa. Super. 12, 461 A.2d 324 (1983); *Commonwealth v. Edrington*, 317 Pa.

Super. 545, 464 A.2d 456 (1983). Pre-trial procedural error is not cognizable on appeal from a plea of guilty in absence of any allegation that the plea was thereby rendered involuntary. *Commonwealth v. Chumley*, 482 Pa. 626, 394 A.2d 497 (1978), *cert. denied*, 440 U.S. 966, 99 Super. Ct. 1515 (1979). Therefore, this claim must be dismissed.

Defendant next claims counsel ineffective for failing to file a motion to suppress defendant's statements. When a defendant enters a guilty plea, the only legally cognizable issues in a post conviction proceeding are those which affect either the voluntariness of the plea or the legality of the sentence. *Commonwealth v. Casner*, *supra*; *Commonwealth v. Edrington*, *supra*. As defendant is not attacking the voluntariness of his plea, or the legality of his sentence, this claim has no merit. During the guilty plea, defendant stated he knew he was giving up his right to suppress his statements (N.T. 2/13/86, p. 40). A challenge to the admissibility of a statement is not appealable from a guilty plea. *Commonwealth v. Faust*, 324 Pa. Super. 492, 471 A.2d 1263 (1984). Therefore, this claim must be dismissed.

Defendant next claims counsel ineffective for failing to explain that a plea to second degree murder involves a mandatory life imprisonment sentence. This claim is without merit. Judge Savitt explained to defendant that by accepting a guilty plea to murder in the second degree, defendant had to be sentenced to no less than life imprisonment (N.T. 2/13/86, pp. 43-44, 45). The court stressed that it had no discretion to sentence defendant to anything less than life imprisonment (*Id.*). When a claim is directly refuted by the record this Court may dismiss the claim without an evidentiary hearing. *Commonwealth v. Cappelli*, 340 Pa. Super. 9, 489 A.2d 813, 818 (1985); *Commonwealth*

v. Brown, 242 Pa. Super. 240, 363 A.2d 1249 (1976). Therefore this claim must be dismissed.

Defendant finally claims counsel ineffective for advising defendant to plead guilty to murder in the second degree when defendant had a viable defense to murder in the second degree. Defendant unequivocally stated during the plea that he killed the victim while attempting to rob him (N.T. 2/13/86, p. 65). Since the killing did not amount to manslaughter, trial counsel had no choice but to plead defendant to murder in the second degree. Defendant's mere speculation that if a trial were conducted, defendant would have been found guilty of murder in the third degree is meritless. As defendant has not shown that he was prejudiced by counsel's actions, this claim must be dismissed. *Commonwealth v. Pierce*, *supra*.

WHEREFORE, the Commonwealth respectfully requests that this Court dismiss defendant's petition without an evidentiary hearing.

Respectfully submitted,

RONALD D. CASTILLE,
District Attorney

BY: _____
NEIL T. MURRAY,
Assistant District Attorney
Motions Unit

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
vs.	:	
JOHN A. PACE	:	NOS. 1272-1275

ORDER

AND NOW, TO WIT this 23RD day of JULY, 1991, it is hereby *ORDERED AND DECREED* that the Commonwealth's Motion to Dismiss the Defendant's Petition for Relief under the Post Conviction Hearing/Relief Act is *GRANTED* and the Defendant's Petition is *DISMISSED*.

BY THE COURT:

/s/ [Illegible]
J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1985
	:	NOS. 1272-1275
v.	:	AUGUST 22, 1991
JOHN PACE	:	
MCCRUDDEN, J.	:	

OPINION

Following an evidentiary hearing at which time defendant testified, the Motion to Dismiss the Defendant's Petition for Post Conviction Relief was granted and the petition was dismissed on July 23, 1991.

In essence, defendant's petition avers that the life imprisonment sentence imposed following defendant's guilty plea to second degree murder warrants defendant to retract his guilty plea. In support thereof, defendant testified *inter alia*, that he was lulled into pleading guilty by the mistaken belief that he would be eligible for parole at some point in the future. We disagree.

During the March 26, 1991 hearing before this court, the applicable portions of the guilty plea colloquy were read into the record of the matter at bar. In no less than three (3) instances, defendant was advised that the mandatory sentence for second degree murder is life imprisonment. In each instance, defendant, who stated before this court that he read, writes and understands the English language, advised the sentencing court that he fully understood the impact of the guilty plea and that the plea was voluntary. As the courts of this Commonwealth have held, claims directly refuted by the trial court record

do not warrant post conviction relief. *COMMONWEALTH V. CAPPELLI*, 340 Pa. Super. 9, 489 A.2d 813 (1985).

Defendant also seeks relief based upon the unsupported allegations that his trial counsel was ineffective in failing to file a motion to suppress defendant's statements to the police, and further, that his trial counsel should have offered additional evidence of an unspecified type during the juvenile decertification hearing. We hold, however, that neither claim is cognizable since the only issues in a post conviction action following a guilty plea are those matters which may effect the voluntariness of the guilty plea or the legality of the sentence. *See COMMONWEALTH V. CASNER*, 315 Pa. Super. 12, 461 A.2d 324 (1983). Neither situation is present in the matter at bar.

BY THE COURT,

/s/ [Illegible]
J.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
Sitting at Philadelphia

COMMONWEALTH OF PENNSYLVANIA,

Appellee

vs.

JOHN PACE,

Appellant

Philadelphia 1991

No. 02429

BRIEF FOR APPELLANT

Appeal from the ORDER OF The Honorable James D. McCrudden, filed July 23, 1991, in the Court of Common Pleas, Criminal Trial Division, which dismissed appellant's P.C.R.A. Petition on October Term, 1985, Bills of Information No. 1272.

Suite 102
8253 Bustleton Avenue
Philadelphia, PA 19152

DAVID RUDENSTEIN
Attorney for Appellant
I.D. No. 33023
(215) 725-9421

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to 42 Pa. C.S.A. Section 742.

ORDER IN QUESTION

The Order of Judgment of The Honorable James D. McCrudden, filed July 23, 1991, in the Court of Common Pleas which dismissed appellant's P.C.R.A. Petition asking for relief on CP No. 8510-1272.

QUESTIONS PRESENTED

I. Did the Post-Conviction Court err when it granted the Commonwealth's Motion to Dismiss, thus, dismissing the defendant's petition under the Post-Conviction Relief act?

ANSWER BELOW: NO.

STATEMENT OF THE CASE

PROCEDURAL HISTORY:

The defendant, having previously been charged with murder and related offenses, was assigned to The Honorable David Savitt for trial on or about February 13, 1986. At that time, the defendant entered a plea to murder in the second degree and thereafter, and on the same date, was sentenced to mandatory life in prison. At trial, the defendant was represented by counsel other than this counsel and after trial, no direct appeal was taken. On or about August 21, 1986, the defendant filed a petition under the Post-Conviction Hearing Act and thereafter, Franklin D. Green, Esquire, was appointed to represent Mr. Pace. An Amended Petition was filed on March 31, 1987 alleging trial counsel's ineffectiveness. Thereafter, a Motion to Dismiss hearing was held in Room 788 City Hall on January 11, 1988, before The Honorable Joseph D. O'Keefe With the motion being held under advisement and with no decision having been rendered. Thereafter, Mr. Green withdrew, apparently for personal reasons, and this counsel was appointed. This counsel filed his own Amended P.C.R.A. Petition which was dismissed without an Evidentiary Hearing on July 23, 1991 by Order of The Honorable James D. McCrudden.

FACTUAL HISTORY:

On September 18, 1985, one Randolph Baldwin was assaulted on the highway and died ten (10) days thereafter. The defendant was arrested, gave an inculpatory statement and thereafter pled guilty to second degree murder, as indicated above.

SUMMARY OF THE ARGUMENT

The defendant received ineffective assistance of counsel, see *Commonwealth ex rel Washington vs. Maroney* and *Strickland vs. Washington*, as trial counsel did not inform defendant that his plea of second degree murder carried a mandatory life imprisonment sentence without possibility of parole and wherein counsel misled the defendant to thinking that he would, in fact, be eligible for parole after serving 10 to 15 years. Moreover, trial counsel was ineffective for failing to correct a trial judge who also led the defendant to believe that he would be eligible for parole after pleading guilty to second degree murder. In that the defendant received ineffective assistance of counsel and, in that the defendant did not have all of the necessary information from which to make a reasoned decision, the defendant's decision to plead guilty to second degree murder was not knowing, intelligent and voluntary and, hence, the defendant should be permitted to withdraw his plea and proceed to trial.

ARGUMENT

POINT I

THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL STAGE AND IS ENTITLED TO A NEW TRIAL.

The defendant's appellate argument is straight forward and simple, to wit, that he received ineffective assistance of counsel at trial and is therefore entitled to a new trial in that trial counsel did not advise him that a "life sentence" meant life without parole and, in fact, trial counsel led the defendant to believe that he would be eligible for parole after serving the period of time in the state prison system and wherein the trial judge, during the colloquy, made certain remarks indicating that the defendant would indeed be eligible for parole.

It is certainly Horn Book law that a guilty plea, to be valid, must have been made in a knowing, intelligent and voluntary manner. Pursuant to the P.C.R.A. Petition, the defendant testified before Judge McCrudden on March 26, 1991. The defendant, according to police records, was age 17 on September 30, 1985, when an inculpatory statement was taken, thus making him no more than age 18 on February 13, 1986, when he pled guilty before Judge Savitt. Mr. Pace went to the 10th grade in school (N/T, 3/26/91, Page 11). Speaking of the advice that his trial counsel gave him, Mr. Pace told Judge McCrudden that:

> "She told me that I would receive ten (10), twelve (12) or fifteen (15) years. That's how much time I would do. It is not like it's the rest of my life. This is what she told me." (N/T, 3/26/91, p. 10).

At that same hearing, at page 10, the following questions and answers were given:

QUESTION:	Now, you know when you appeared in front of Judge Savitt, he did question you about that and he did tell you that you would be doing a life sentence and that he had no discretion and you acknowledged on the record that you understood that. Do you understand that? Do you recall that?
ANSWER:	Yes, I do.
QUESTION:	Can you explain to His Honor, Judge McCrudden, what you were thinking when Ms. Dunworth told you that you would be doing 10 or 12 years and His Honor told you he has no discretion, it's going to be life?
ANSWER:	I never know what life meant. I never come across anybody. I was going on basically what my counsel told me, that I would do 10, 12 or 15 years.
THE COURT:	You heard the Judge say that you would do a life sentence?
THE APPELLANT:	I didn't know what life sentence meant.
THE COURT:	What did you think it meant?
THE APPELLANT:	I don't know. She told me to plead guilty.

QUESTION BY
MR. RUDENSTEIN: When he was talking about life sentence and your attorney was talking about something in the range of 10 to 12 years, were you thinking that you would be paroled at some point?

THE APPELLANT: Yes, I did.

Certainly any 18 year old young man with a 10th grade education would have been confused enough by the discrepancy between the Judge's remarks and his counsel's advice, but it got worse during the part of the colloquy where Judge Savitt said the following:

> "With regard to counsel's request, I surely will recommend and make part of the sentencing Order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward *rehabilitation,* particularly since he is a young man and, at *some time in the future, may be subject to release* and it is hoped that the prison sentence, for *whatever duration it be*, certainly aid in rehabilitating him." (Emphasis added by counsel) (N/T, 2/13/86, p. 43).

Counsel had an absolute duty to explain to her client that he was pleading guilty to a crime that carried a mandatory life sentence *and* life, in Pennsylvania, means life without possibility of parole. Without all of the necessary and possible information that he was entitled to receive, it is impossible to say that the defendant's choice to plead guilty was knowing, intelligent, or voluntary. While it may be indisputable that the defendant took certain actions that led to the death of the victim, it cannot be argued that murder in the second degree was the only

possible verdict, nor can it be argued that a life sentence was the only possible sentence. Murder in the third degree was a possible verdict and, certainly, the sentence would have been much less than life. This is not pure conjecture on this counsel's part as trial counsel, at pages 15 and 16 of the trial transcript, informed Judge Savitt of the following:

> "Mr. Baldwin apparently said something to my client, such as 'What are you doing?', or something to that effect. My client said, 'What do you mean?'. He said, 'I know what you are up to'; that is Mr. Baldwin.
>
> Mr. Baldwin according to the statement, reached out to my client. My client had a blackjack in his pocket.
>
> He hit Mr. Baldwin with the blackjack, he did not rob Mr. Baldwin. There is certainly an intimation that my client may have contemplated that, at least according to the statements. There were two statements.
>
> My client walked away from Mr. Baldwin and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.
>
> I think it's significant, Your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fist fight was ensuing, so it's a very ticklish question as to when the intent to rob occurred."

Thus, from the transcript itself, it is clear that trial counsel believed that there existed a viable defense to first

and second degree murder but yet, counselled the defendant to plead guilty to second degree murder and its mandatory life imprisonment sentence, but failed to inform the defendant that it would be life without parole but yet held out hope to the defendant that he might serve only between 10 and 15 years which was consistent with a plea to third degree but not to second degree.

While it is true that Judge Savitt did inform the defendant that he would be pleading guilty to a life sentence, it is equally true that his own counsel, as well as the judge, said things that would make a reasonable person, especially a young man with a 10th grade education believe that he would serve a term of years and then become eligible for parole on his life sentence. This is not some fantasy of the defendant's; it was a product of what he was told together with being a product of common belief in American, to wit, that murderers do not serve their full sentences. The news media, both print and electronic, are replete with stories, almost on a daily or weekly basis, of some criminal, and perhaps, some murderer, who did not serve a full sentence before coming eligible for parole. People know that Charles Manson periodically comes up for parole even in light of his gruesome, multiple murders. Thus, the defendant's belief was not a fantasy but was grounded in fact, both from what he knows as a citizen of the country and from what the judge and his own defense counsel told him. In that the defendant did not have all of the facts and, further, in that the defendant did have viable alternatives of which he was unaware, the defendant's plea was not knowing, intelligent and voluntary and, hence, he should be permitted to withdraw his plea and go to trial, as he received ineffective assistance of counsel. See *Commonwealth ex rel Washington vs. Marone*, 427 Pa. 599, 235 A. 2d 349 (1967) and *Strickland vs. Washington*, 104 S. Ct. 2052 (1984).

CONCLUSION

For the foregoing reasons and arguments, this counsel respectfully requests that a new trial be granted to the defendant/appellant, John Pace.

Respectfully submitted by:
/s/ David Rudenstein
DAVID RUDENSTEIN,
Esquire,
Attorney for defendant/
appellant

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA,	:	OCTOBER TERM, 1985
vs.	:	NOS. 1272-1275
JOHN A PACE,	:	

ORDER

AND NOW, TO WIT this 23RD day of JULY, 1991, it is hereby *ORDERED AND DECREED* that the Commonwealth's Motion to Dismiss the Defendant's Petition for Relief under the Post Conviction Hearing/Relief Act is *GRANTED* and the Defendant's Petition is *DISMISSED*.

BY THE COURT:
/s/ [Illegible]
J.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Appellee	:	Superior Court No. 02429 PHL 1991
— vs.	:	Common Pleas No.
JOHN PACE,	:	8510-1272
Appellant	:	

PROOF OF SERVICE

I hereby certify that I am this 10th day of October serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail addressed as follows:

District Attorney of Philadelphia (215) 686-8000
Appeals Unit
1421 Arch Street
Philadelphia, PA 19102

Attention: Donna G. Zucker, Deputy Chief

/s/ [Illegible]
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1421 arch street
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LOGO/SEAL 686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

November 25, 1991

David A. Szewczak, Esquire
Prothonotary
Superior Court of Pennsylvania
530 Walnut Street
Philadelphia, Pennsylvania 19107

Re: **Commonwealth v. John Pace**
No. 2429, Philadelphia 1991

Dear Mr. Szewczak:

On February 13, 1986, defendant pled guilty to second degree murder and possessing an instrument of crime (Nos. 1272, 1275, October Term, 1985) before the Honorable David N. Savitt.[1] Judge Savitt sentenced defendant to life imprisonment for the murder and a concurrent term of one to two years for possessing an instrument of crime. Content with his guilty plea, defendant did not move to withdraw the plea, modify the sentence, or appeal.

Six months later, however, defendant had a change of heart and filed a *pro se* petition for relief under the Post

[1] On September 18, 1985, at approximately 4:35 a.m., while attempting to rob fifty-six year old Randolph Barwin, defendant struck the victim repeatedly on the head with a blackjack. The victim died one week later as a result of the severe head injuries he sustained during the robbery (N.T. 2-13-86, 49-63).

Conviction Hearing Act.[2] With the aid of appointed counsel, he filed an amended petition. Following a hearing on the Commonwealth's motion to dismiss but before a decision was rendered, counsel withdrew and present counsel was appointed to represent defendant. A second amended PCHA petition was filed, alleging for the first time that trial counsel's ineffectiveness resulted in an unknowing, unintelligent and involuntary plea.[3] Upon the Commonwealth's motion to dismiss the new petition, another hearing was held on March 26, 1991. At that hearing, defendant testified that during the guilty plea colloquy he had not understood what it meant to be sentenced to life imprisonment (N.T. 3-26-91, 10). On July 23, 1991, the Honorable James D. McCrudden granted the Commonwealth's motion to dismiss defendant's petition.

On appeal from this denial of relief, defendant now repeats that claim. Although the Commonwealth will not file a formal brief, it opposes granting defendant any relief because his claim is meritless.

[2] 42 Pa. C.S.A. § 9541 *et seq.* (1982) (superseded) (hereinafter PCHA). The PCHA has been modified in part and renamed the Post Conviction Relief Act (hereinafter PCRA), effective April 13, 1988, 42 Pa. C.S.A. §§ 9541-46. The new provisions apply to all actions for collateral relief filed on or after the effective date.

[3] Although this second amended petition was filed after the effective date of the PCRA *(see* footnote 2, *supra)*, because the original petition was filed under the PCHA, the instant claim must be analyzed pursuant to the terms of the PCHA, not the PCRA.

I. DEFENDANT WAIVED HIS CHALLENGE TO THE VALIDITY OF THE GUILTY PLEA BY NOT FILING A PETITION WITH THE TRIAL COURT TO WITHDRAW THE PLEA, BY NOT APPEALING HIS JUDGMENTS OF SENTENCE, AND BY NOT SUSTAINING HIS BURDEN OF PROOF NOW.

Defendant contends that the PCHA court erred in granting the Commonwealth's motion to dismiss his petition. He claims that although the court and counsel informed him that his plea carried a mandatory sentence of life imprisonment, he nonetheless interpreted certain comments made by the court and counsel to mean that despite being sentenced to life imprisonment, he would be eligible for parole in ten to fifteen years.[4] Accordingly, defendant faults counsel for failing to ensure that he understood the true import of a life sentence before he entered his guilty plea, and contends that in the absence of that information, his plea was involuntarily tendered.

Defendant's claim is waived. At the guilty plea hearing, defendant was explicitly advised that in order to challenge the validity of his guilty plea, he was required to file a motion to withdraw the plea within ten days of the imposition of sentence (N.T. 2-13-86, 73). *See* Pa.R.Crim.P 321[5]. Because defendant failed to file this motion and

[4] Life imprisonment in Pennsylvania means life imprisonment without the possibility of parole.

[5] Pennsylvania Rule of Criminal Procedure 321 provides, in pertinent part:

> A motion challenging the validity of a guilty plea, or the denial of a motion to withdraw a guilty plea shall be in writing and shall be filed with the trial court within ten (10) days after imposition of sentence.

Pa.R.Crim.P. 321(a).

never offered any excuse for his failure, his claim is not preserved for appellate review.

42 Pa.C.S.A. §9544(b); *Commonwealth v. Spencer,* 344 Pa. Super. 380, 496 A.2d 1156, 1160 (1985).

Defendant was further advised at the colloquy that he had thirty days from the imposition of sentence to file a direct appeal (N.T. 2-13-86, 73). Because he did not appeal, it is presumed that he made a knowing and understanding decision to forego review. *Commonwealth v. Jackson,* 329 Pa. Super. 293, 478 A.2d 474, 477 (1984). Defendant does not bother to rebut the presumption; indeed, he does not even blame counsel for his failure to file an appeal. Rather, he simply invokes the magic words "ineffectiveness of counsel" to avoid a finding of waiver for PCHA purposes. Attacks on the effectiveness of counsel, however, may not be used to circumvent the consequences of waiving an issue. *Commonwealth v. Klinger,* 323 Pa. Super. 181, 470 A.2d 540 (1983).

Ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only where the ineffectiveness causes the defendant to enter an involuntary or unknowing plea. *Id.* While defendant alleges that counsel and the court misled him into believing that his plea carried the probability of parole, he does not argue that he would not have entered guilty pleas had he clearly understood that a life sentence meant life in prison. Absent that argument, defendant's claim must be rejected. *C.f. Commonwealth v. Jackson,* 330 Pa. Super. 144, 479 A.2d 5 (1984) (no relief where appellant did not allege that he would not have entered favorable plea bargain had he known possible fines); *Commonwealth v. Klinger, supra*

(appellant did not allege that he was ignorant of requirement of unanimous verdict or that he would not have pled guilty had he known it); *Commonwealth v. Campbell,* 309 Pa. Super. 214, 455 A.2d 126 (1983) *(allocatur* denied) (appellant did not allege that he would not have entered guilty plea if court had explained the elements of the crimes charged); *Commonwealth v. Anthony,* 307 Pa. Super. 312, 453 A.2d 600 (1982), *aff'd,* 504 Pa. 551, 475 A.2d 1303 (1984) (appellant did not allege that he would not have entered guilty plea if he had known of requirements of unanimous verdict).

II. IN ANY EVENT, EVEN IF REVIEWED ON THE MERITS, TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE AND DEFENDANT VOLUNTARILY ENTERED THE PLEA.

Defendant contends that his plea was not voluntary, intelligent and knowing because he had been ineffectively misled by his counsel and the court as to what sentence he would receive. However, there is a presumption that counsel acted effectively. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 2065 (1984); *accord Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 975 (1987). To prevail on a claim of ineffectiveness, defendant must demonstrate the arguable merit of the claim underlying the allegation of counsel's deficient performance, the lack of any reasonable basis for counsel's action, and that he was prejudiced by counsel's substandard performance. *Strickland v. Washington,* 104 S.Ct. at 2064; *accord Commonwealth v. Pierce,* 527 A.2d at 975. The burden always rests on the defendant to overcome counsel's presumed effectiveness and to show true prejudice, *i.e.,* by demonstrating that, but for counsel's errors, he would not

have entered the plea. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366 (1985); *Commonwealth v. Frometa,* 366 Pa. Super. 313, 531 A.2d 434 (1987), *rev'd on other grounds,* 520 Pa. 552, 555 A.2d 92 (1989). Viewed in this light, defendant's claim will not stand up.

During his colloquy, defendant was twice told in no uncertain terms that by entering a guilty plea he would be sentenced to life imprisonment (N.T. 2-13-86, 43-45). There is not one word in the colloquy about anything less than life imprisonment.[6] When the court asked defendant if he understood that he would be sentenced to life imprisonment, defendant replied, "Yes;" and when the court asked defendant if he still wished to plead guilty in the

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[6] Defendant points to a comment made by Judge Savitt after defendant had been colloquied and sentenced to demonstrate that the court incorrectly believed that parole was in defendant's future and that the court conveyed that message to defendant:

> . . . I surely will recommend and make part of the sentencing order that the defendant be confined at Camp Hill or a suitable facility for someone of his age, where he can obtain some help toward rehabilitation, particularly since he is a young man and at some time in the future, may be subject to release and it is hoped that the prison sentence, for whatever duration it be, certainly aid him in rehabilitating him

(N.T. 2-13-86, 72). Defendant's attempt to utilize this remark to support his claim is wholly unwarranted. Judge Savitt well understood that life imprisonment meant life imprisonment without the possibility of parole, but he also recognized that there was an outside chance that the governor might commute the life sentence sometime in the future because of defendant's young age, and that, in such event, rehabilitative programs in prison would serve defendant well. His comment after he sentenced defendant certainly does not mean that the judge incorrectly believed and conveyed to defendant that parole was a distinct possibility or probability. Judge Savitt knew that parole was a legal impossibility. *See Commonwealth v. Rozplochi,* 385 Pa. Super. 357, 561 A.2d 25, 31 (1989) (judge is presumed to know the law).

face of a life sentence, defendant answered, "Yes." Defendant certainly may not obtain relief now by insinuating that his colloquy responses demonstrating his understanding that he would be sentenced to life in prison were lies. *Commonwealth v. Cortino,* 387 Pa. Super. 210, 563 A.2d 1259 (1989).

Defendant nonetheless insists that despite his on-the-record assurances that he understood his sentence before he entered his plea, he really believed that "life" meant something substantially less that "life," although he did not have any idea what that lesser term might be (N.T. 3-26-91, 10). He harbored this belief, he says, because virtually everyone in America harbors the same belief, and because the court and counsel effectively confirmed that belief. For several reasons, this argument must be summarily rejected.

Defendant insists that his misimpression about the meaning of a life sentence in Pennsylvania stemmed from a commonly held belief in America that a life sentence is really less than a life sentence. There is nothing in the record to support either that defendant based his misimpression on such a belief, or that such an alleged "common belief" even exists. Accordingly, this Court may not entertain those notions in its analysis of defendant's claim. *See Commonwealth v. Griffis,* 310 Pa. Super. 547, 456 A.2d 1071 (1983) (appellant does not develop record that appellate court may consider merely be making factual allegations in appellate brief).

Even if defendant's hope of serving a sentence of less than life was the motivating factor in his entry of a guilty plea, still there would be no basis for withdrawal of the plea. Defendant simply may not use his misplaced hope of

beating the mandatory life sentence (which he clearly was advised he faced) as a ground for withdrawal of his plea. *See Commonwealth v. Waddy,* 463 Pa. 426, 345 A.2d 179 (1975); *Commonwealth v. West,* 336 Pa. Super. 180, 485 A.2d 490 (1984). This is true even if defendant had relied on counsel's advice that a more lenient outcome was likely. *Commonwealth v. Egan,* 322 Pa. Super. 71, 469 A.2d 186 (1983) (*en banc*); *Commonwealth v. Harris,* 286 Pa. Super. 601, 429 A.2d 685 (1981).[7]

Moreover, defendant has not demonstrated the alleged prejudice he sustained as a result of counsel's actions, opting instead to rest his claim on a conclusory assertion of such prejudice. His failure to shoulder his burden of proof in this regard is fatal to his claim. *See Commonwealth v. Hilton,* 400 Pa. Super. 579, 584 A.2d 334 (1990) (appellant claiming ineffectiveness must sustain prejudice prong of three-pronged ineffectiveness test). Defendant's quest for appellate relief must fail.

[7] Even if there were some merit to defendant's underlying claim, he has not demonstrated, as he must, that trial counsel did not have a reasonable basis for her actions. *See Commonwealth v. Jones,* No. 1506 Pittsburgh 1990 (Pa. Superior, filed August 20, 1991) (the unreasonableness of counsel's actions is a prong that must be proved). Here, although he could have done so, defendant did not explore this matter with trial counsel at the evidentiary hearing on his PCHA petition. Hence, he has forfeited his opportunity to sustain his burden of proving ineffectiveness of counsel. *See Commonwealth v. Bowers,* 245 Pa. Super. 214, 369 A.2d 370 (1976) (by failing to provide the evidence necessary to prove claim, appellant effectively concedes that he cannot prove that counsel lacked reasonable basis for decision).

III. CONCLUSION.

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the denial of post-conviction relief.

Respectfully submitted,

/s/ John K. McDonald
JOHN K. McDONALD
Assistant District Attorney

/s/ Joan Weiner
JOAN WEINER
Assistant District Attorney

/s/ Donna G. Zucker
DONNA G. ZUCKER
Assistant Chief, Appeals Unit

cc: Honorable James D. McCrudden
David Rudenstein, Esquire

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
v.	:	PENNSYLVANIA
JOHN PACE,	:	No. 2429 Philadelphia 1991
Appellant	:	Submitted: November 25, 1991
	:	(Filed Mar. 30, 1992)

Appeal from Post Conv. Relief Act July 23, 1991, in the Court of Common Pleas of Philadelphia County, Criminal No. 8510-1272 thru 1275.

BEFORE: OLSZEWSKI, KELLY, and BROSKY, JJ.

MEMORANDUM:

This is an appeal from the order of the Court of Common Pleas of Philadelphia County granting the Commonwealth's motion to dismiss appellant's petition for post conviction relief. Finding no error in the lower court's dismissal of appellant's petition, we affirm the order of the lower court. A discussion of the case follows.

Appellant pled guilty to second-degree murder and, possession of an instrument of crime on February 13, 1986,[1] and was sentenced to life imprisonment for murder and one to two years to run concurrently for possession of an instrument of crime. No motion to withdraw or reconsider the guilty plea was filed, and appellant did not take a direct appeal. Some six months after his guilty plea and

[1] The charges arose out of the September 18, 1985, beating death of Randolph Baldwin during the course of a robber.

sentencing, appellant filed a *pro se* petition for relief under the P.C.H.A.[2] Two amended petitions were filed by appellant's two post conviction counsel. A hearing was held on March 26, 1991, at which appellant testified. On July 23, 1991, the lower court granted the Commonwealth's motion to dismiss.

Appellant argues that the lower court erred in dismissing his petition for post conviction relief. Appellant's argument is that he was somehow misled into entering his guilty plea by the statements and advice of his counsel and by the statements of the court. Further, appellant argues that his counsel was ineffective for failing to properly advise him of the consequences of his guilty plea. We find no merit to appellant's arguments.

Appellant's argument with regard to being misled by the statements of counsel and the court is that he was misled as to the nature of a life sentence. Similarly, appellant has argued that his counsel was ineffective for failing to properly inform him of the nature of a life sentence. Appellant argues that he did not know that a life sentence in Pennsylvania means a life sentence without the possibility of parole. Appellant argues that he held a mistaken belief that a life sentence somehow meant a term of years.

Appellant's argument that he was misled into entering a guilty plea by the statements of the court is without merit. Prior to accepting appellant's guilty plea, the lower court conducted an extensive guilty plea colloquy with appellant. We have reviewed this colloquy and find that it adequately informed appellant of the consequences of his

[2] Post Conviction Hearing Act, 42 Pa.C.S.A. § 9541-9551 (Purdon's 1982).

plea. Further, we find nothing in the statements or questions of the court which could have misled appellant regarding the consequences of his plea. Regarding the statements of the court, we have reviewed the transcript of the colloquy and see nothing that indicates that appellant would receive other than a life sentence. In the opinion of this Court, a life sentence in Pennsylvania means a life sentence – nothing more, nothing less. There is no chance of parole for a person sentenced to life imprisonment in Pennsylvania.[3] The colloquy conducted by the lower court indicated nothing else to appellant.[4] Appellant's argument that he was misled by the statements of the lower court is without merit.

Regarding appellant's argument that his counsel at the guilty plea colloquy misled him into believing that a life sentence was other than a life sentence without the possibility of parole, we find that the lower court's colloquy handled any potential misunderstanding. The lower court specifically asked appellant at the colloquy whether he understood that once the judge accepted the plea, it would be up to the judge to sentence him and there would be no

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[3] There, of course, exists the possibility that the governor could commute the life sentence to a term of years.

[4] Appellant has argued that the lower court made a statement that the court would recommend that appellant be confined where he could receive some rehabilitative treatment. Appellant argues that this misled appellant into entering his guilty plea because it indicated that he would at some point be subject to parole. The court below did not indicate that appellant would ever be subject to parole. Further, the statement of which appellant complains occurred not during the colloquy but, rather, after the court had accepted appellant's guilty plea and had moved on to sentencing appellant. Since the statement occurred after appellant had entered his guilty plea, we do not see how it could have influenced appellant to enter his plea.

"negotiations or understandings." (N.T. February 13, 1986, at 42.) The court then went on to explain to appellant that the sentence for second-degree murder would be life imprisonment and that the court would have no discretion in that regard. (N.T. February 13, 1986, at 42-45.)

Appellant was fully informed that a life sentence would be imposed. "It is axiomatic that a disappointed expectation regarding a sentence does not constitute grounds for withdrawing a guilty plea." *Commonwealth v. West,* 336 Pa.Super. 180, ___, 485 A.2d 490, 493 (1984) (citations omitted). Appellant was fully informed of the mandatory life sentence. He is entitled to no relief based on an argument that he expected a life sentence to be a term of years. The colloquy is complete and quite clear that a life sentence would be imposed and that no other agreements or negotiations regarding sentencing would be considered. Appellant's argument that he was misled by his counsel is without merit.

Appellant has also argued that his counsel at the guilty plea was ineffective for failing to inform him properly that a life sentence meant a life sentence and not a term of years. Generally, it is presumed that counsel is competent, and appellant bears the burden of establishing otherwise. *Commonwealth v. Williams,* 524 Pa. 218, 570 A.2d 75 (1990). In order to prevail upon a claim of ineffective assistance of counsel, appellant must establish, [illegible] unreasonable, that another meritorious course was available and that defendant [appellant] was prejudiced by counsel's ineffectiveness." *Id.* at ___, 570 A.2d at 81. "Allegations of ineffectiveness of counsel in connection with a guilty plea will provide a basis for relief only if ineffectiveness caused an involuntary or unknowing plea." *West,* at ___, 485 A.2d at 493. As was stated above, we

believe the court's colloquy adequately informed appellant that he would be sentenced to a life sentence. Appellant's averments that he was misled by the statements of his counsel are in contradiction to the fact that he was fully and properly informed of the consequences of his plea by the court. In light of the fact that the court fully informed appellant of the consequences of his plea, we cannot find that any ineffectiveness of his counsel resulted in an involuntary plea. We find no merit to appellant's argument regarding ineffectiveness of counsel.

Finding no merit to appellant's arguments, we affirm the order of the lower court dismissing appellant's petition for post conviction relief.

Order affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA.,
EASTERN DISTRICT OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA.	:	BILL NO. 1272-1275.
	:	TERM NO. OCTOBER 1985.
-v-	:	
	:	RE: UNDOCKETED
JOHN A. PACE.	:	ALLOCATUR NUMBER,
	:	MAY 1992

PRO SE – PETITION FOR PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC. PURSUANT TO 42 C.S.§.724(A) PA. R.A.P. #1112.

YOUR PRO SE PETITIONER RESPECTFULLY MOVES THE HONORABLE SUPREME COURT OF PENNSYLVANIA TO GRANT PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC IN SUPPORT OF MERITORIOUS REASONS AND ALLEGATIONS AS TO, THE FOLLOWING:

1.) PRIOR P.C.R.A. COUNSEL DAVID S. RUDENSTEIN., ABANDONED – JOHN A. PACE THE PETITIONER IN FAILING TO ASSIST IN HIS ADVANCE REQUEST TO ATTORNEY TO PURSUE AND TAKE AN TIMELY ALLOCATUR APPEAL IN SUPREME COURT IN THIS INSTANT CASE. *NOTE*: SEE EXHIBIT #4 TO SUPPORT THIS ALLEGATION. (EXHIBIT #4., ATTACHED TO ALLOCATUR PETITION).

2.) PRIOR P.C.R.A. COUNSEL DAVID S. RUDENSTEIN., IN ORDINATE RESPONSE, TO PETITIONER'S ADVANCED REQUEST TO PURSUE AND TAKE AN APPEAL DID CONSEQUENTLY. DELAYED PRO SE PETITIONER IN PURSUING AND FILING A TIMELY NOTICE

AND ANOCATUR APPEAL IN THE SUPREME COURT AS REQUIRED UNDER PA. R.A.P.#1112. ESPECIALLY, WHERE P.C.R.A. COUNSEL'S RESPONSE WERE WRITTEN AND DATED ON 4.29/92. AND RECEIVED ON OR ABOUT 5/4/92 OVER LAPPING THE DUE DATE MANDATED FOR, A TIMELY ALLOCATUR APPEAL TO BE FILED. *NOTE:* SEE EXHIBIT #5.TO SUPPORT THIS ALLEGATION. (EXHIBIT #5 ATTACHED TO ALLOCATUR PETITION).

3.) THEREAFTER AND CONSEQUENTLY TO P.C.R.A. COUNSEL DAVID S. RUDENSTEIN'S ACTIONS AND OR NON-ACTIONS IN FAILURE TO PURSUE AND TAKE AN ALLOCATUR APPEAL. THE PRO SE-PETITIONER NEEDED TO PRESERVE TIME TO SEEK A PROFESSIONAL PARALEGAL AT S.C.I.H. PRISON, WHERE AS, CONSEQUENTLY TO HIS ATTEMPTS AND SEEKING HE DID MANAGED TO RETAIN A PROFESSIONAL PARALEGAL NAMED MACK KING, WHO IS PREPARING AND LITIGATING THE FOREGOING ALLEGATIONS AND ISSUES HEREIN THE, INSTANT ALLOCATUR APPEAL PETITION FOR P.C.R.A. RELIEF TO THE PETITIONER JOHN A PACE.

CONCLUSION.

THEREFORE, FOR ALL THE FOREGOING MERITORIOUS REASONS AND ALLEGATIONS STATED HEREIN THIS PLEADING. IT IS HEREBY DECLARED THAT THE HONORABLE COURT WILL GRANT PRO SE PETITIONER'S PETITION FOR PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC IN THAT PRO SE PETITIONER/APPELLANT MAY PURSUE HIS RIGHTS TO APPEAL AND ACCESS TO COURT INTER ALIA IN THE INSTANT ALLOCATUR APPEAL PETITION FOR P.C.R.A. RELIEF THE

PETITIONER/APPELLANT JOHN A. PACE, HERETOFORE AND HEREUPON IS SEEKING FORTHWITH.

EXECUTED DATE: 06/26/92.

RESPECTFULLY SUBMITTED

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

ATTESTED BY: MACK KING., AF-8679., A CERTIFIED PROFESSIONAL PARALEGAL FOR S.C.I.H. CONCERNED PRISONERS FOR EQUAL JUSTICE.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA.	:	BILL NO. 1272-1275.
	:	TERM NO. OCT. 1985.
-v-	:	
	:	UNDOCKETED
JOHN A. PACE.	:	ALLOCATUR NUMBER,
(PRO SE APPELLANT)	:	_____.

PROOF OF SERVICE.

I, JOHN A. PACE, HEREBY CERTIFY THAT I AM THIS DATE OF 06/26/92 SERVING THE FOREGOING PRO SE PETITION FOR PERMISSION TO FILE PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC UPON PERSON AND IN MANNER INDICATED BELOW WHICH SERVICE SATIFY THE REQUIREMENTS OF PA. R.C.P. #121 BY FIRST CLASS U.S. MAIL TO:

DISTRICT ATTORNEY'S OFFICE OF
PHILADELPHIA COUNTY
C/O DISTRICT ATTORNEY LYNNE ABRAHAM.
APPEALS UNIT 1421 ARCH STREET.
PHILADELPHIA, PA. 19102

EXECUTED DATE: 06/26/92.

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

ATTESTED BY: MACK KING. A CERTIFIED PROFESSIONAL PARALEGAL.

IN THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA	:	C.P. #1272-1275. OCTOBER 1985.
-v-	:	
JOHN A. PACE. (PETITIONER)	:	

PETITIONER'S MOTION FOR LEAVE TO
REDUCE COPIES OF PETITION FOR ALLOCATUR
APPEAL. INCONFORMITY TO
42 PA. C.S.A. §.724(A) PA.R.A. P. 1112.

YOUR PETITIONER JOHN A. PACE., RESPECTFULLY MOVES THE HONORABLE SUPREME COURT OF PENNSYLVANIA, TO GRANT LEAVE TO REDUCE COPIES ON PETITION FOR ALLOCATUR APPEAL FOR REASONS AS TO FOLLOWING:

1. PETITIONER IS A PAUPER PROCEEDING AS A PRO SE-LITIGANT ON THIS INSTANT CASE, ON ALLOCATUR APPEAL.

2. PETITIONER WISH TO LESSEN THE AMOUNT OF MONIES HE SPEND FOR ALL PETITIONS AND OTHER NECESSARY COURT MATERIAL THAT NEEDS XEROXING AND POSTAGE FEES PAID. THEREFORE, THE PETITIONER WISH TO REDUCE THE AMOUNT OF PETITIONS FROM EIGHT COPIES AND ORIGINAL COPY TO THREE AND ORIGINAL COPIES OF ALLOCATUR PETITION PLUS ALSO INCLUDING A TRUE AND EXACT COPY OF ALLOCATUR PETITION NEEDED TO BE SERVED TO THE OFFICE OF MISS. LYNNE ABRAHAM. ESQUIRE, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY.

3. PETITIONER STILL ARE NOT PRESENTLY EMPLOYED WHILE HE IS CONFINED AT STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, PA. 16652.

4. PETITIONER HAVE NOT RECEIVED WITHIN THE PAST TWELVE MONTHS ANY INCOME FROM A BUSINESS PROFESSION OR OTHER FORM OF SELF EMPLOYMENT OR NEITHER IN THE FORM OF RENT PAYMENTS, INTEREST, DIVIDENDS, OR OTHER, SOURCES.

5. PETITIONER STILL DO NOT HAVE ANY CASH OR CHECKING OR SAVING ACCOUNTS TO PAY THE COST FOR EIGHT AND ORIGINAL COPIES OF ALLOCATUR PETITION. (INCLUDING ONE COPY TO THE DISTRICT ATTORNEY)

6. PETITIONER STILL DO NOT OWN ANY REAL ESTATE, STOCKS, BONDS, NOTES, AUTOMOBILES

OR OTHER VALUABLE PROPERTY TO USE FOR SECURITY FOR THE COST OF COURT AND EIGHT AND ORIGINAL COPIES OF ALLOCATUR PETITION AND ATTORNEY FOR THIS INSTANT CASE. (INCLUDING ONE COPY TO THE DISTRICT ATTORNEY)

7. PETITIONER STILL DO NOT HAVE ANY PERSON WHO HE MAY DEPEND UPON FOR SUPPORT AND TO PAY THE COST OF COURT AND EIGHT AND ORIGINAL COPIES OF ALLOCATUR PETITION FOR THIS INSTANT CASE. FURTHERMORE, NONE OF PETITIONER'S FINANCIAL STATUS HAS CHARGE SINCE THE FILING OF HIS P.C.R.A. PETITION IN C.P. COURT AND A APPEAL IN SUPERIOR COURT OF PENNSYLVANIA. (AS A PAUPER PRO SE LITIGANT)

THEREFORE, YOUR PETITIONER REQUEST THAT HIS MOTION FOR LEAVE TO REDUCE COPIES (FROM NINE COPIES TO FOUR COPIES) ON ALLOCATUR PETITION WILL BE GRANTED FORTHWITH.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING INFORMATION IS TRUE AND CORRECT.

DATE: 06/26/92.

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PROOF OF SERVICE.

I, JOHN A. PACE, HEREBY CERTIFY THAT I AM THIS 06/26/92 DAY OF JUNE, 1992. SERVING THE FOREGOING MOTION FOR LEAVE TO REDUCE COPIES ON ALLOCATUR PETITION UPON PERSONS AND IN MANNER WHICH SATISFY THE REQUIREMENT OF PA. R.C.P. #121 BY FIRST CLASS U.S. MAIL TO:

DISTRICT ATTORNEY'S OFFICE OF
PHILADELPHIA COUNTY
LYNNE ABRAHAM-DISTRICT ATTORNEY
1421 ARCH STREET.
PHILADELPHIA, PA. 19102

EXECUTED DATE: 06/26/92.

/s/ John A. Pace
JOHN A. PACE., #AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

EXECUTED AND ATTESTED BY: MACK KING. AF-8679., A CERTIFIED PROFESSIONAL PARALEGAL. (IN CONFORMITY TO PA. BAR RULE 371. SAVING PROVISION.

IN THE SUPREME COURT OF PENNSYLVANIA.,
IN EASTERN DISTRICT, AT.,
PHILADELPHIA, PENNSYLVANIA.

ALLOCATUR DOCKET NUMBER _____1992.

COMMONWEALTH OF PENNSYLVANIA

VS.

JOHN A. PACE., PRO SE APPELLANT.

PETITION FOR ALLOWANCE OF APPEAL,
NUNC PRO TUNC.

PETITION FOR ALLOWANCE OF APPEAL FROM THE DECISION OF THE SUPERIOR COURT, DATED ON THE 30TH DAY OF MARCH 1992. AT NO. 2429. PHILADELPHIA 1991. SAID ORDER AFFIRMING THE JUDGMENT OF THE COMMON PLEAS COURT OF PHILADELPHIA COUNTY. OF JUDGE JAMES D. McCRUDDEN ENTERED ON 23RD. DAY OF JULY 1991 FROM: P.C.R.A. RELIEF UNDER BILL AND TERM NUMBER(S) 1272-1275 OCTOBER 1985.

(X) PRIOR/( )CURRENT ATTORNEY
(X) PROCEEDING PRO SE.

DAVID S. RUDENSTEIN.
ADDRESS: SUITE 102, 8253 BUSTLETON AVE. PHILA, PA. 19152.

/s/ John A. Pace
APPELLANT: JOHN PACE. AY-6445

ADDRESS: P.O. DRAWER R,
HUNTINGDON, PA.16652

STATEMENT OF JURISDICTION

THE PENNSYLVANIA SUPREME COURT HAS ORIGINAL JURISDICTION OVER THIS INSTANT ALLOCATUR APPEAL PURSUANT TO 42. PA. C.S.A. §.724 (A) WHEREAS, THIS APPEAL WERE INITIALLY TAKEN FROM A FINAL ORDER/OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY PENNSYLVANIA AND AN APPEAL FROM THE ORDER AND OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA ON: 3/30/92, AFFIRMING THE JUDGMENT OF JUDGE JAMES D. McCRUDDEN OF THE COMMON PLEAS COURT OF PHILADELPHIA PENNSYLVANIA. ON: JULY 23RD, 1991.

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STATEMENT OF THE CASE.

THE PRO SE PETITIONER/APPELLANT IS JOHN A. PACE., AN INDIVIDUAL PRESENTLY, CONFINED AT STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. DRAWER R, HUNTINGDON, PA. 16652. ON SEPTEMBER 18, 1985 HE WAS CHARGED WITH MURDER AND POSSESSION OF AN INSTRUMENT OF CRIME HE WAS ASSIGNED TO HONORABLE JUDGE DAVID SAVITT FOR TRIAL ON OR ABOUT FEBRUARY 13, 1986. AT THAT PARTICULAR TIME THE DEFENDANT, ENTERED A UNKNOWINGLY AND UNINTELLIGENTLY GUILTY PLEA TO MURDER IN THE SECOND DEGREE UNDER AN ALLEGED PLEAD BARGIN OR PLEAD GUILTY FOR A .LESSER DEGREE OF CHARGE(S) AND THEREAFTER ON FEBRUARY 13, 1986. THE DEFENDANT JOHN A. PACE WERE SENTENCED TO A MANDATORY LIFE IMPRISONMENT FOR MURDER AND ONE TO TWO YEARS TO RUN CONCURRENTLY (TO LIFE) FOR POSSESSION OF AN INSTRUMENT OF CRIME. TRIAL COUNSEL WERE MOIRA DUNWORTH NO MOTION TO WITHDRAW GUILTY PLEAD OR TO RECONSIDER GUILTY PLEAD AND SENTENCE WAS FILED AND TRIAL COUNSEL DIDN'T TAKE A DIRECT APPEAL ON BEHALF OF DEFENDANT. (THE PETITIONER/APPELLANT) ON OR ABOUT AUGUST 21, 1986. THE DEFENDANT FILED A PETITION UNDER THE POST CONVICTION HEARING ACT AND THEREAFTER. *FRANKLIN D. GREEN. ESQUIRE.*, WAS APPOINTFD TO REPRESENT *MR. JOHN A. PACE.*, AN AMENDED P.C.R.A. PETITION WAS FILED ON MARCH 31, 1987, ALLEGING TRIAL COUNSEL'S INEFFECTIVENESS AND DELIBERATE INDIFFERENCE TO *MR. JOHN A. PACE*. THEREAFTER, A MOTION TO DISMISS HEARING WAS HELD

IN COURT ROOM # 788. CITY HALL IN PHILADELPHIA, PA. ON JANUARY 11, 1988 BEFORE THE HONORABLE JOSEPH D. O'KEEFE. THE SAID MOTION WERE PLACED UNDER ADUISEMENT AND WITH NO, DECISION HAVING BEEN RENDERED BY THE COURT. THEREAFTER, APPOINTED COUNSEL FRANKLIN D. GREEN, WITHDREW FROM THE P.C.R.A. PETITION FOR SOME ALLEGED PERSONAL REASONS. AND THEREAFTER, DAVID RUDENSTEIN, ESQ. WERE APPOINTED TO COUNSELED DEFENDANT'S P.C.R.A. PETITION. THIS COUNSEL FILED A SECOND AMENDED P.C.R.A. PETITION ON JULY 23, 1991. THE PETITION WAS DISMISSED WITHOUT AN EVIDENTIARY, HEARING AND NO RULE TO SHOW PROBABLE CRITERIA OF WHY P.C.R.A. RELIEF SHOULD NOT BE GRANTED TO DEFENDANT (PETITIONER/APPELLANT) JOHN A. PACE BY ORDER OF THE HONORABLE JAMES D. McCRUDDEN ON OCTOBER 10, 1991. DAVID RUDENSTEIN, APPOINTED COUNSEL FOR DEFENDANT, (PETITIONER/APPELLANT) FILED AN NOTICE OF APPEAL BETWEEN JULY 23RD, AND JULY 29, 1991 AND THEREAFTER THIS SAME COUNSEL ASLO FILED A BRIEF ON 10/10/91 FOR APPELLANT IN SUPERIOR COURT. ON MARCH 30 THE SUPERIOR COURT THEREBY AFFIRMED THE JUDGMENT OF THE COMMON PLEAS COURT OF PHILADELPHIA COUNTY IN THAT DENYING THE DEFENDANT, (PETITIONER/APPELLANT) P.C.R.A. RELIEF ON HIS PETITION. THEREAFTER DAVID RUDENSTEIN., (P.C.R.A. AND APPELLATE COUNSEL) FAILED TO PURSUED AND TAKE DEFENDANT'S (PETITIONER/APPELLANT) INSTANT CASE FURTHER ON AN PETITION FOR ALLOWANCE OF APPEAL IN THIS HONORABLE

SUPREME COURT OF PENNSYLVANIA, TO SEEK ELIGIBLE P.C.R.A. RELIEF DEFENDANT (PETITIONER/APPELLANT) ARE ENTITLED THEREOF. THEREFORE, DEFENDANT (PETITIONER/APPELLANT) THEREBY HAVE ENTERED THE FOREGOING INSTANT PRO SE ALLOWANCE OF APPEAL FOR THE HONORABLE COURT TO REVIEW, RECONSIDER, AND ACCEPT JOHN A. PACE'S ALLOWANCE OF APPEAL PLEADING UNDER THESE MERITORIOUS ALLEGATIONS AND CLAIMS, FOR ADJUDICATION TO P.C.R.A RELIEF IN WHICH PETITIONER/APPELLANT JOHN A. PACE, HEREBY SEEKS HEREIN WITH GOOD WILL AND GOOD FAITH.

STATEMENT OF QUESTIONS INVOLVED

1. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN*:

A. *NOT CONSIDERING AND ACCEPTING THE FACT THAT TRIAL COUNSEL AND ALL OTHER SUBSEQUENTED APPOINTED COUNSEL(S) WERE INEFFECTIVE BY NOT PRESERVING ALL CLAIMS ON APPEAL AND POST CONVICTION RELIEF ACT PETITIONS AND APPEAL OF THE SAME*?

B. THAT ALL APPOINTED COUNSELS' ACTIONS AND OR NON-ACTON HAVE RESULTED IN A MISCARRIAGE OF JUSTICE, WITH DELIBERATE INDIFFERENCE CAUSED TO APPELLANT/PETITIONER?

2. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACTS*:

A. *THAT PETITIONER'S ALLEGATIONS AND CLAIMS REVEALED THAT TRIAL COUNSEL AND ALL TO HER SUBSEQUENTED APPOINTED COUNSEL(S) REFUSED OR NEGLECTED TO DO SOMETHINGS OR DID SOMETHING INEPTLY*?

B. *AND THAT PETITIONER DID SHOWED GENUINE FACTS WHERE ALL NAMED COUNSELS' PERFORMANCES MADE ERROR, OMISSIONS, AND PREJUDICED APPELLANT'S/PETITIONER'S CONSTITUTIONAL RIGHTS*?

3. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT, CONSIDERING, AND ACCEPTING THE FACT THAT THE PURPOSE FOR IT AND THIS COURT TO REVIEW THESE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS TO TREAD THE FINE, LINE BETWEEN STRATEGIC, AND TACTICAL DECISIONS VERSUS THE DEFICIENT PERFORMANCES WHICH HAVE PRIOR AND OR CURRENTLY PREJUDICED THE APPELLANT/PETITIONER BY PRIOR TRIAL COUNSEL AND OR ANY OTHER SUBSEQUENTED APPOINTED COUNSELS THAT, FAILED AND OR WILL FAIL TO RAISE ALL MERITORIOUS ISSUES AT PRETRIAL, TRIAL, POST TRIAL PROCEEDINGS, APPEAL, P.C.R.A. PROCEEDINGS, AND P.C.R.A. APPEALS*?

4. *DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT, CONSIDERING AND ACCEPTING THE FACT THAT THE COURSE CHOSEN BY INITIAL TRIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS HAD NO REASONABLE BASIS DESIGNED TO SERVE THE*

BEST OF INTEREST TO THE APPELLANT/PETITIONER?

A. *AND ALSO IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THERE WERE NO THEORIES INVOLVED IN ALL ISSUES AND ARGUMENTS RAISED CURRENTLY ON THE INEFFECTIVENESS OF INITIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS?*

5. DID THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT, CONSIDERING AND ACCEPTING THE FACT THAT THE APPELLANT/PETITIONER DIDN'T HAVE *AN PROPER UNDERSTANDING OF TERMS OF SENTENCING (ON COURT RECORD) AND WASN'T PROPERLY ADVISED AND OR TOLD BEFORE HE AND THE COURT ACCEPTED THE PLEAD BARGAIN OF THE FOLLOWING INFORMATION UNDER PARAGRAPHS NUMBER ONE THROUGH NUMBER FOUR – "C". ON ISSUE NUMBER FIVE?*

STATEMENT OF ISSUES TO BE REVIEWED.

ISSUE NUMBER ONE.

1. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN:

(A.) NOT CONSIDERING AND ACCEPTING THE FACT THAT, TRIAL COUNSEL AND ALL OTHER SUBSEQUENTED APPOINTED COUNSEL(S) WERE INEFFECTIVE BY NOT PRESERVING, ALL CLAIMS ON APPEAL AND POST CONVICTION RELIEF ACT PETITIONS AND APPEAL OF THE SAME.

(B.) THAT, ALL APPOINTED COUNSELS' ACTIONS AND OR NON-ACTIONS HAVE RESULTED IN A MISCARRIAGE OF JUSTICE WITH DELIBERATE INDIFFRENCE CAUSED TO APPELLANT/PETITIONER.

IN THIS SPECIFIC ISSUE THE PETITIONER/APPELLANT ARE ENTITLED AND MAY CONTEND AND RAISE APPROPRIATE FACTUAL AVERMENTS OF THE INEFFECTIVE ASSISTANCE OF PRIOR TRIAL COUNSEL OR ANY OTHER SUBSEQUENTED APPOINTED COUNSEL, IN, NOT PRESERVING THIS/AND OR ALL OTHER CLAIMS APPLICABLE ON POST TRIAL APPEAL AND POST CONVICTION RELIEF ACT PETITION(S) AND APPEALS IN WHICH HAVE RESULTED IN A MISCARRIAGE OF JUSTICE. SEE: COMMONWEALTH VS. LAWSON, 519. PA. 175, 546. A.2D. 589. (1988) WHERE THE LAW DOCTRINES PERCISELY STATES THAT "SUCCESSIVE, POST COLLATERAL PETITION IS ALLOWED, (AS APPLICABLE IN APPELLANT'S/PETITIONER'S INSTANT CASE) WHERE PETITIONER PLEADS AND DEMONSTRATES THOSE CLAIMS WOULD RESULT IN A MISCARRIAGE OF JUSTICE." *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCRIPTS PAGES NUMBER ONE THROUGH NUMBER SEVENTY FIVE AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT RECORD. SEE EXHIBIT(S) NUMBER(S) *ONE THROUGH FIVE*. *NOTE:* TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPRIATE MANNER, INWHICH WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER. *JOHN A. PACE*.

ISSUE NUMBER TWO

2. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACTS:

(A.) THAT PETITIONER'S ALLEGATIONS AND CLAIMS REVEALED THAT TRIAL COUNSEL, AND ALL OTHER SUBSEQUENTED APPOINTED COUNSEL(S) REFUSED OR NEGLECTED TO DO SOMETHING OR DID SOMETHING INEPTLY.

(B.) THAT PETITIONER DID SHOWED GENUINE FACTS WHERE ALL NAMED COUNSELS' PERFORMANCES MADE ERRORS, OMISSIONS, AND PREJUDICED TO APPELLANTS'/PETITIONER'S CONSTITUTIONAL RIGHTS.

IN THIS SPECIFIC ISSUE THE PETITIONER/APPELLANT ARE ENTITLED AND MAY, CONTEND AND RAISE APPROPIATE FACTUAL AVERMENTS THAT COUNSEL(S) REFUSED OR, NEGLECTED TO DO SOMETHING OR DID SOMETHING INEPTLY. WHERE HE HAVE SHOWN NOT, ONLY ERROR OR OMISSION BUT PREJUDICED TO PETITIONER'S RIGHTS. (AS APPLICABLE IN APPELLANT'S/PETITIONER'S INSTANT CASE). ESPECIALLY, WHERE PETITIONER'S RIGHTS WERE PREJUDICED BY PRIOR TRIAL COUNSEL AND ALL OTHER SUBSEQUENTED, APPOINTED COUNSELS IN NOT PRESERVING THIS/AND ALL OTHER CLAIMS APPLICABLE, ON POST TRIAL APPEAL AND POST CONVICTION RELIEF ACT PETITION(S) AND APPEALS. *SEE*: COMMONWEALTH VS. PIERCE, 515 PA. 153, 527, A.2d. 973. (1987), COMMONWEALTH VS. KNOX, 304 PA. SUPER. 368, 450, A.2D. 725. (1982). WHERE THE LAW DOCTRINES

PERCISELY, STATES THAT "*ALLEGATIONS WITH SUPPORTING EVIDENCE AND SHOWING PREJUDICED OF RIGHTS ARE SUFFICIENT ON P.C.R.A. PETITIONS.*" *NOTE*: SEE ALSO PLEAD BARGAIN COLLOQUY TRANSCRIPTS PAGES NUMBER ONE THROUGH SEVENTY FIVE AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT RECORD SEE EXHIBIT(S) NUMBER(S) *ONE THROUGH FIVE. NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPRIATE MANNER IN WHICH, WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER. *JOHN A. PACE.*

ISSUE NUMBER THREE.

3. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THE PURPOSE FOR IT AND THIS COURT TO REVIEW THESE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS TO TREAD THE FINE LINE, BETWEEN STRATEGIC AND TACTICAL DECISIONS VERSUS THE DEFICIENT PERFORMANCES WHICH HAVE PRIOR AND OR CURRENTLY PREJUDICED THE APPELLANT/PETITIONER BY PRIOR TRIAL COUNSEL AND OR ANY OTHER SUBSEQUENTED APPOINTED COUNSELS THAT, FAILED AND OR WILL FAIL TO RAISE ALL MERITORIOUS ISSUES AT PRETRIAL, TRIAL, POST TRIAL PROCEEDINGS, APPEALS, P.C.R.A. PROCEEDINGS, AND P.C.R.A. APPEALS.

IN THIS SPECIFIC ISSUE THE PETITIONER/ APPELLANT ARE ENTITLED AND MAY CONTEND AND RAISE APPROPIATE FACTUAL AVERMENTS ON THE PURPOSE FOR THE P.C.R.A. AND THIS COURT TO REVIEW THESE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS TO TREAD THE FINE LINE BETWEEN STRATEGIC AND TACTICAL DECISIONS VERSUS THE, DEFICIENT PERFORMANCES WHICH HAVE PRIOR AND OR CURRENTLY PREJUDICED THE APPELLANT/PETITIONER BY TRIAL COUNSEL'S AND OR ANY OTHER SUBSEQUENTED APPOINTED COUNSELS' ACTIONS OR AND NONACTIONS IN FAILURE TO RAISE ALL MERITORIOUS ISSUES AT PRETRIAL, TRIAL, POST TRIAL PROCEEDINGS, APPEALS, P.C.R.A. PROCEEDINGS, AND P.C.R.A. APPEALS. (INCLUDING THIS INSTANT CASE ENGAGING ON APPEAL) ESPECIALLY, THOSE MERITORIOUS ISSUES THAT PERTAINING TO WHERE TRIAL COUNSEL AND ALL SUBSEQUENTED APPOINTED COUNSELS FAILED TO PROPERLY, SUFFICIENTLY, AND EFFECTIVELY RAISED AND CHALLENGED THE INVALIDITY OF PETITIONER'S (APPELLANT'S GUILTY PLEAD AND ILLEGALITY OF HARSH EXCESSIVE AND UNCONSTITUTIONAL SENTENCE INPOSED, CONSEQUENTLY TO TRIAL COUNSEL'S, INCOMPETENCY, PSYCHOLOGICAL COERCION PERJURED, AND PETIT LEGAL ADVISING, MISREPRESENTATION AND ASSISTANCE OF LAW TO JOHN PACE, THE PRO SE APPELLANT/PETITIONER IN THIS INSTANT CASE ENGAGED ON APPEAL. *SEE*: HENRY VS. MISSISSIPPI, 379. U.S. 443, 85 S.CT. 564, 13 L.ED.2D. 408. (1965), COMMONWEALTH VS. McGORGAN, 449, PA. 584, 279, A.2D 456. (1972), STRICKLAND VS. WASHINGTON, 104

S.CT. 2052, 80 L.ED.2D. 674. (1984) FURTHERMORE, IN THIS INSTANT CASE NONE OF THE COUNSELS APPOINTED SUBSEQUENTLY TO TRIAL COUNSEL PER HER INEFFECTIVE PERFORMANCES CAN EXPECTED TO BE AN EFFECTIVE AND ZEALOUS ADVOCATES TO PRO SE PETITIONER/APPELLANT JOHN A. PACE. UNLESS HE/OR SHE SHOULD RAISE THE ISSUE OF, INEFFECTIVENESS OF TRIAL COUNSEL IN FAILING TO RAISE ALL MERITORIOUS ISSUES EXISTED PRIOR TO TRIAL, DURNING TRIAL AND SUBSEQUENTLY TO TRIAL PROCEEDINGS. THE PETITIONER/APPELLANT HAS REBUT THE PRESUMPTION THAT THE CONVICTION IS PROPER. THE BURDEN OF PROVING EVERY ELEMENT OF P.C.R.A. CONTENTIONS IS UPON THE, PETITIONER. HOWEVER, IT SHOULD BE RECOGNIZED THAT THE PETITIONER HAVE SHOWED THE STANDARD OF PREPONDERANCE OF EVIDENCE IN SUPPORT OF HIS CLAIMS FOR P.C.R.A. REMEDY UNDER ALLOCATE APPEAL. *SEE*: COMMONWEALTH VS. LOGAN, 468. PA. 424, 364, A.2d. 266. (1976). COMMONWEALTH VS. KNOX, 304. PA. SUPER. 368, 450. A.2d. 725. (1982), COMMONWEALTH VS. BLAIR, 274. PA. SUPER 606, 418. A.2d. 571. (1980). THE PETITIONER HAVE PERFORMED IN ALL ALLEGATIONS AND ARGUMENTS AS THE ACT, SPECIFICALLY, MANDATES, THAT ALL FACTS IS IN SUPPORT OF THE ALLEGED ERRORS OF WHICH THE PETITION(S) IS BASED AND THAT ALL SUPPORTING EVIDENCE AND AVAILABLE GROUNDS WILL BE SETFORTH. (CONSEQUENTLY, PRECISELY IN MANNER THAT HAVE BEEN PREPARED AND LITIGATED FOR, PETITIONER JOHN A. PACE, HEREIN AND HERETO THIS INSTANT ALLOCATUR NUNC PRO TUNC. PER THE LEGAL KNOWLEDGE, ADVISEMENT

AND ASSISTANCE OF MR. MACK KING. A CERTIFIED PARALEGAL FOR CONCERNED PRISONERS SEE KING JUSTICE AT S.C.I.H.) FURTHERMORE, THE PETITIONER ARE ABLE AND HAVE PROVEN THE EXISTENCE OF EXTRAORDINARY CIRCUMSTANCES TO JUSTIFY HIS FAILURE TO INITALLY RAISE THESE ISSUES, AT TRIAL, POST-TRIAL, APPEAL P.C.R.A. PETITION(S) ESPECIALLY, SINCE PETITIONER HAVE NO LEGAL KNOWLEDGE AND ARE UNINTELLIGENT TO STATUTES OF STATE AND FEDERAL COMMON LAWS, AND CONSTITUTIONS, AND CITATIONS OF CASE LAWS. IT SHOULD ALSO BE RECOGNIZED, THAT IN THIS INSTANT CASE THE TRIAL COUNSEL WERE DEFINATELY INEFFECTIVE, (AS WELL AS ALL SUBSEQUENTED COURT APPOINTED P.C.R.A. COUNSELS) INTER ALIA APPLICABLE TO TRIAL COUNSEL'S ACTIONS AND NON-ACTIONS IN NOT RAISING ALL ISSUES, WERE INITIALLY AND PRESENTLY AVAILABLE AND APPLICABLE TO APPELLANT/PETITIONER *JOHN A. PACE'S INSTANT CASE*. INWHICH DEFINATELY HAVE AND CURRENTLY PREJUDICED APPELLANT'S/PETITIONER'S CONSTITUTIONAL AND CIVIL RIGHTS (OF 13TH, 14TH ETC. AMENDMENTS) (ESPECIALLY, IF AND WHEN CONSIDERED WAIVED AND FINALLY LITIGATED UNDER THE EXTRA ORDINARY CIRCUMSTANCES EXISTED/EXISTS IN THIS INSTANT CASE, ENGAGED ON ALLOCATUR APPEAL.) *SEE*: 42 C.S.A. §9544(B), PA. C.S.A. §.9544(C). *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCIPTS PAGES NUMBER ONE THROUGH SEVENTY FIVE AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT, RECORD. SEE EXHIBIT(S) NUMBER(S)

ONE THROUGH FIVE. *NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY, SUFFICIENTLY, AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPIATE MANNER IN WHICH WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER *JOHN A. PACE*.

ISSUE NUMBER FOUR.

4. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THE COURSE CHOSEN BY INITIAL TRIAL COUNSEL, AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS HAD NO REASONABLE BASIS DESIGNED TO SERVE THE BEST OF INTEREST TO APPELLANT/PETITIONER.

4.A. AND ALSO IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THERE WERE NO, THERIES INVOLVED IN ALL ISSUES AND ARGUMENTS RAISED CURRENTLY ON THE INEFFECTIVENESS OF INITIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS.

IN THIS SPECIFIC ISSUE THE PETITIONER/APPELLANT ARE ENTITLED AND MAY CONTEND AND RAISE APPROPIATE FACTUAL AVERMENTS THAT THE COURSE CHOSEN BY INITIAL TRIAL COUNSEL AND ALL OTHER NAMED SUBSEQUENTED APPOINTED COUNSELS HAD NO REASONABLE BASIS DESIGNED TO SERVE THE BEST OF INTEREST TO PETITIONER/APPELLANT *JOHN A. PACE*. *SEE*: COMMONWEALTH VS. McBEE, 513, PA. 255, 520. A.2d.10 (1986), COMMONWEALTH VS.

NAUMAN, 345. PA. SUPER, 457, 498, A.2d.913. (1985), 345 PA. SUPER AT 462.A.2d. AT 915.THE PETITIONER FURTHER CONTENDS THAT HE DIDN'T MEET THE P.C.R.A. COURT'S CRITERIA OF A DISMISSAL ON P.C.R.A. PETITION(S) WITHOUT A HEARING. PARTICULARLY, SINCE HE HAVE DEMONSTRATED FROM LOWER COURTS' RECORDS INTER ALIA, A, SHOWING OF EXTRAORDINDINARY AND UNUSUAL CIRCUMSTANCES THAT PREJUDICED HIS CONSTITUTIONAL RIGHTS.THE P.C.R.A. COURT AND THE SUPERIOR COURT HAD JURISDICTION ON THIS INSTANT CASE AND APPEAL MATTER WHERE THESE COURTS COULD AND SHOULD HAVE GRANTED P.C.R.A. RELIEF TO PRO SE PETITIONER AND APPELLANT ESPECIALLY, WHERE THERE WERE NO THEORIES INVOLVED ON THE LOWER COURTS RECORDS IN THE ISSUES, EVIDENCE AND ARGUMENTS RAISED ON INEFFECTIVENESS OF TRIAL COUNSEL AND, ALL OTHER SUBSEQUENTED APPOINTED COUNSELS THAT DELIBERATELY CAUSED INDIFFRENCES TO PETITIONER/APPELLANT IN FAILING TO PRESERVED THESE FOREGOING ISSUES IN, LOWER COURT, DIRECT APPEALS, P.C.R.A. COURT, AND ON P.C.R.A. APPEALS ON THE INVALIDITY OF PLEAD BARGIN AND ILLEGALITY OF SENTENCE. SEE: 42. PA.C.S.A. §.9944(B), SEE ALSO PA.P.C.P. #353, PA.R.C.P. #320, #321(A), (B), (C). *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCRIPTS PAGES NUMBER ONE THROUGH NUMBER SEVENTY FIVE AND ALL, P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT RECORD. SEE EXHIBIT(S), NUMBER(S). *NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY, SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPIATE, MANNER IN

WHICH WOULD HAVE BEEN THE BEST OF INTEREST TO APPELLANT/PETITIONER, *JOHN A. PACE*.

ISSUE NUMBER FIVE.

5. THE P.C.R.A. COURT COMMITTED AN HARMFUL AND REVERSIBLE ERROR IN NOT CONSIDERING AND ACCEPTING THE FACT THAT THE APPELLANT/PETITIONER DIDN'T HAVE AN, PROPER UNDERSTANDING OF TERMS OF SENTENCING, (ON COURT RECORD) AND WASN'T PROPERLY ADUISED AND OR TOLD BEFORE HE AND THE COURT ACCEPTED THE PLEAD BARGIN OF THE FOLLOWING INFORMATION UNDER PARAGRAPHS NUMBER ONE THROUGH NUMBER FOUR-C. ON ISSUE NUMBER FIVE:

1. THAT LIFE SENTENCE WILL OR WILL NOT BE LIFE IN PRISON FOR THE REST OF HIS NATURAL LIFE. *NOTE*: SEE GUILTY PLEAD COLLOQUY TRANSCRIPTS PAGES #28 THROUGH #44. (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE GUILTY PLEAD.)

2. THAT LIFE SENTENCE WILL OR WILL NOT BE WITH PAROLE. *NOTE*: SEE GUILTY PLEAD, COLLOQUY TRANSCRIPTYS. PAGES #28 THROUGH #44. (WHERE COUNSEL KNEW OR SHOULD HAD, KNOWN BEFORE GUILTY PLEAD.)

3. THAT LIFE SENTENCE WILL BE WITH OR WITHOUT RECONSIDERATION AND MODIFICATION OF SENTENCE. *NOTE*: SEE GUILTY PLEAD COLLOQUY TRANSCRIPTS PAGES #28 THROUGH #44. (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE GUILTY PLEAD.)

4. THAT COUNSEL; A.) WILL FAIL TO PROPERLY ADVISE SUGGEST, AND REQUEST THAT DEFENDANT SHOULD WITHDRAW HIS GUILTY PLEAD IN TIMELY, OR NUNC PRO TUNC PROCEEDINGS OR AND WITHIN (10) TEN DAYS PER MOTION PETITION PLEADING. ESPECIALLY, SINCE THE COURT REFUSED TO RECONSIDER AND MODIFY THE DEGREE OF MURDER AND OR THE SENTENCE IMPOSED. SEE GUILTY PLEAD COLLOQUY TRANSCRIPTS. PAGES #72, #73. (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE/AFTER GUILTY PLEAD.)

B.) THAT COUNSEL WOULD FAIL TO CHALLENGE THE INVALIDITY OF, PLEAD AND ILLEGALITY OF THE HARSH, EXCESSIVE SENTENCE IMPOSED. (AS TO, A JUVENILE WITH FIRST MURDER OFFENSE COMMITTED WHILE DEFENDANT WERE IN A DIMINISHED STATE OF MIND THROUGH THE INFLUENCE OF DRUG AND ALCOHOL THAT CONSEQUENTED TO A, DEFICIENT UNCONSTITUTIONAL AND UNLAWFUL PLEAD BARGIN AND SENTENCE: (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE/AFTER GUILTY PLEAD.)

C.) OR THAT COUNSEL WOULD FAIL TO PROPERLY, ADVISE, SUGGEST, AND REQUEST THAT DEFENDANT SHOULD REQUEST TO DO THE SAME. (BEFORE/AFTER GUILTY PLEAD.) WITHIN A PERIOD OF (30) THIRTY DAYS. (AS TO, GUILTY PLEAD IN SPACE B) (WHERE COUNSEL KNEW OR SHOULD HAD KNOWN BEFORE/AFTER GUILTY PLEAD.) *NOTE*: SEE, GUILTY PLEAD COLLOQUY TRANSCRIPTS PAGE #71 THROUGH 75. ESPECIALLY, SINCE, THE COURT DIRECTED COUNSEL TO TAKE AN TIMELY APPEAL. (AS TO, SPACES B. ANDC.) SEE

PAGE #73. *NOTE*: SEE PAGES #28 THROUGH #67. GUILTY PLEAD ACCEPTED AND ENTERED BY THE DEFENDANT. SEE ALSO PAGES #67 THROUGH #75. GUILTY PLEAD ACCEPTED AND SENTENCING, BY THE COMMON PLEAS COURT. BEFORE HONORABLE DAVID N. SAVITT, TRIAL/PLEAD BARGIN, COLLOQUY JUDGE IN COURTROOM #602 CITY HALL PHILADELPHIA, PENNSYLVANIA. 19107. ON FEBRUARY 13, 1986. RE: COMMONWEALTH VS. JOHN A. PACE. OCTOBER TERM. 1985. ON BILL NO. (S) 1272-1275. IN THIS INSTANT CASE AT TRIAL THE OTHER APPEARANCES WERE: CHARLES GALLAGER ESQUIRE. ASSISTANT DISTRICT ATTORNEY FOR THE COMMONWEALTH, MOIRA D. DUNWORTH ESQUIRE FOR THE DEFENDANT. THE AUTHORITY AND JURISDICTION OF, THE COURT FOR THIS INSTANT CASE ARE IN COMMONWEALTH -V- RUSH, 281. PA. SUPER 92. (1980), COMMONWEALTH -V- COLE, 434. PA. 288, 263. A.2d. 339. (1970), IN RUSH IS TO RECONSIDER AND MODIFY THE SENTENCE TIMELY OR NUNC PRO TUNC. IN COLE IS THE COURT'S INHERENT POWER TO CORRECT AN, ILLEGAL HARSH, EXCESSIVE SENTENCE OR OBVIOUS PATENT MISTAKES IN IT'S ORDERS AND PROCEEDINGS AT ANY TIME. SEE PA.R.C. P. #1405, #1410, #1501. SEE ALSO TITLE 42. PA.C.S.A. §.9944(B), PA.R.C.P. #353, PA.R.C. P. #320, #321(A),(B),(C). TITLE 42 PA.C.S.A. §.9541-9551. (STATE COURT'S JURISDICTION FOR RELIEF UNDER POST CONVICTION HEARING ACT IN PURDON'S 1982) TITLE 42. PA. C.S.A. §.724(A) (SUPREME COURT'S JURISDICTION) FURTHER, THE LAW DOCTRINES STATED THAT DUE PROCESS REQUIREMENTS INTER ALIA ARE NOT MET UNLESS A GUILTY PLEAD IS, MADE VOLUNTARILY WITH KNOWLEDGE AND

INTELLIGENCE OF DEFENDANT AFTER BEING PROPERLY ADVISED AND WITH FULL UNDERSTANDING OF THE CONSEQUENCES OF PENALTY, OF CRIMINAL CHARGES. A REAL NOTICE OF THE TRUE NATURE OF THE CHARGE(S) IS, INDISPENSIBLE TO A VALID GUILTY PLEAD. IF, (AS IN, PETITIONER'S INSTANT CASE) THE GUILTY PLEAD COLLOQUY DOES NOT REFLECT A VOLUNTARY PLEAD, THE COURTS ARE BOUND, BY FEDERAL AND STATE LAWS AND CONSTITUTIONS TO REVERSE THE CONVICTION, (JUDGMENT ON PLEAD AND SENTENCE) AND REMAND FOR A NEW TRIAL, NEW PLEA BARGIN COLLOQUY OR RESENTENCE TO A PROPER AND LESSER DEGREE OF CHARGE(S) AND SENTENCE(S) SEE BOYKIN -V- ALABAMA; 395. U.S. 238,89. S.CT. 1709. (1969), UNITED STATES EX REL CROSBY -V- BRIERLEY 404. F.2d. 790. (3Rd. CIR. PHILA. 1968), COMMONWEALTH -V- RODGERS 465. PA. 379, 35O. A.2d. 815. (1976), U.S.C.A. CONST. AMENDS 1,5,6,8, AND 14. AND PA.R. CRIMINAL PROCEDURE RULE #319. THE PENNSYLVANIA SUPREME COURT'S SIX(6) MANDATORY AREAS OF INQUIRY WHICH THE COURT(S) SHOULD ASCERTAINED THE DEFENDANT JOHN, PACE'S KNOWLEDGE AND UNDERSTANDING OF HIS GUILTY PLEAD, TO SUPPORT A ESTABLISHED CONSTITUTIONAL VALID PLEA OF GUILTY IN HIS PLEAD BARGIN COLLOQUY. ARE IN COMMONWEALTH -v- WILLIS, 471. PA. 50, 369. A.2d. 1189. (1977). SEE ALSO THE DEFENDANTS/ APPELLANT'S ANSWERS THAT WERE AS FOLLOWS:

(1) DOES THE DEFENDANT UNDERSTAND THE NATURE OF THE CHARGES TO WHICH HE IS, PLEADING GUILTY? (NO) HE DIDN'T KNOW THAT

SECOND DEGREE MURDER CHARGE WOULD BE CONSEQUENTED TO A PENALTY OF HIS NATURAL LIFE IN CARCERATED.

(2.) (YES) THERE WERE A FACTUAL BASIS FOR THE PLEAD, TO GET A LESSER SENTENCE THAN NATURAL LIFE IN PRISON.

(3.) (YES) DEFENDANT UNDERSTOOD HE HAD A RIGHT TO A TRIAL BY JURY. BUT CHOOSE TO, PLEAD GUILTY FOR A LESSER SENTENCE THAN NATURAL LIFE IN PRISON.

(4.) (YES) DEFENDANT UNDERSTOOD HE PRESUMED INNOCENT UNTIL PROVEN GUILTY BUT CHOOSE TO PLEAD GUILTY FOR MERCY OF THE COURT FOR A LENIENT SENTENCE THAN LIFE IN PRISON FOR HIS NATURAL LIFE.

(5.) (NO) DEFENDANT WERE NOT A WARE PRIOR TO PLEAD THAT THE PERMISSIBLE RANGE, OF (2ND.) SECOND DEGREE MURDER WOULD CARRY A MANDATORY SENTENCE OF LIFE IN PRISON FOR THE REST OF HIS NATURAL LIFE.

(6.) (YES) DEFENDANT WERE AWARE THAT THE JUDGE WERE NOT BOUND BY TERMS OF ANY, PLEAD AGREEMENT FOR THE OFFENSE CHARGED. HOWEVER, THE JUDGE ACCEPTED THE GUILTY PLEAD BUT DIDN'T OFFERED ANY BARGIN AS TO, A MORE LENIENT SENTENCE THAN NATURAL LIFE. DUE TO COUNSEL'S INCOMPETENCY PSYCHOLOGICAL COERCION, PERJURED, AND PETIT LEGAL ADVISING AND ASSISTANCE TO DEFENDANT THAT PURSUED HIM TO ACCEPT A, GUILTY PLEAD BARGIN (WITHOUT LENIENT AGREEMENT) TO A

2ND. DEGREE MURDER CHARGE INSTEAD OF A LESSER DEGREE OF MURDER CHARGE AND LENIENT PENALTY TO BE CONSIDERED AND POSSIBLY ACCEPTED BY THE TRIAL JUDGE PRESIDING AT THE PLEAD BARGIN, COLLOQUY.

FOOT NOTE:

ALL SAID PETITIONER'S INSTANT ALLEGATIONS AND MERITORIOUS CLAIMS ARE BASED, UPON GENUINE MATERIAL FACTS AND ARE SUPPORTED BY STATE AND FEDERAL STATUTES LAWS, CONSTITUTIONAL LAWS AND PRESIDING. AUTHORITIES CASE LAWS INWHICH PETITIONER/APPELLANT ARE SEEKING AN EFFECTUATE APPEAL AND P.C.R.A. REMEDY. ESPECIALLY, WHERE THE SUPERIOR COURT JUDGES' PANEL THROUGH SUSMISSION OF THEIR OPINIONS DID INDEED OVERLOOKED FAILED TO RECONSIDERED AND DIDN'T ACCEPTED THE FACT THAT TRIAL COUNSEL'S AND OR ALL SUBSEQUENTED P.C.R.A. APPOINTED COUNSELS' AND OR, TRIAL JUDGES' AND OR MOTION JUDGES' ACTIONS AND NON-ACTIONS DID CONSEQUENTED TO A DENIAL OF: 1.) PROPER ACCESS ACCESS TO COURT., 2.) DUE PROCESS., 2.) EQUAL, PROTECTION REMEDY., 4.) FAIL AND IMPARTIAL TRIAL AND OR EFFECTIVE ASSISTANCE OF, TRIAL COUNSEL., 5.) AND DEPRIVED THE PETITIONER/APPELLANT OF THE SAFEGARD FROM: A.) MISCARRIAGE OF JUSTICE., B.) PREJUDICED TO CONSTITUTIONAL RIGHTS., C.) AND CRUEL UNUSUAL PUNISHMENT. (PER AN UNLAWFUL AND UNCONSTITUTIONAL PLEAD BARGIN, COLLOQUY AND SENTENCE IMPOSED) THEREFORE, FOR ALL THE AFOREMENTIONED REASONS, ALLEGATIONS,

AND MERITORIOUS CLAIMS HEREIN, THIS INSTANT CASE MUST BE CONSIDERED AS EXTRAORDINARY AND DEVASTATING CIRCUMSTANCES TO PETITIONER/APPELLANT *JOHN A. PACE.* (ON MENTALLY, PHYSICALLY SPIRITUALLY, AND LEGALLY BASIS). *NOTE*: SEE ALSO PLEAD BARGIN COLLOQUY TRANSCRIPTS PAGES NUMBER *ONE* THROUGH NUMBER *SEVENTY FIVE*. AND ALL P.C.R.A. PROCEEDINGS AND DOCKET ENTRIES ON LOWER COURT, RECORD. SEE EXHILIT(S) NUMBER'S *ONE THROUGH FIVE*. *NOTE*: TRIAL COUNSEL AND P.C.R.A. COUNSELS FAILED TO RAISED/OR AND PROPERLY SUFFICIENTLY AND EFFECTIVELY RAISED THIS ISSUE IN AN APPROPIATE MANNER INWHICH WOULD HAVE BEEN THE BEST OF INTER-EST TO APPELLANT/PETITIONER *JOHN A. PACE.*

CONCLUSION

THEREFORE, FOR ALL THE FOLLOWING REASONS YOUR PETITIONER/APPELLANT *JOHN A. PACE.*, HEREBY INVOKE THIS HONORABLE COURT TO GRANT THE FOLLOWING REMEDIES:

1. (X) THAT THE COMMONWEALTH'S MOTION TO DISMISS THE DEFENDANT'S ALLOCATUR, PETITION FOR P.C.R.A. RELIEF WILL BE DENIED WITH AN ESTOPPEL AGAINST COMMONWEALTH. (AS TO THIS INSTANT CASE AND MATTER, SEE PARAGRAPHS # 4 and # 5.

2. (X) THAT THE RELIEF SEEKED WILL BE GRANTED WITHOUT A REMAND FOR A HEARING SEE PA.R.C.P. #1507(B) WITH RESJUDICATA ON

BEHALF OF PETITIONER/APPELLANT. SEE ALSO, PARAGRAPHS #4 AND #5.

3. (X) OR THAT THE RELIEF SEEKED WILL BE CONDUCTED WITH A REMAND AND EVIDENTIARY HEARING TO ADDRESS THE CLAIMS IN PETITIONER'S/APPELLANT'S P.C.R.A. PETITION FOR RELIEF. SEE: PA,R.C.P. #1508(A) WITH RESJUDICATA ON BEHALF OF PETITIONER/APPELLANT. SEE ALSO PARAGRAPHS #4 AND #5.

4. (X) IT IS FURTHER ORDERED AND DECREED THAT THE SUPREME COURT WILL PLACE A, STAY ON JUDGMENT AND REMAND THIS CASE TO LOWER COURT FOR RESENTENCING TO A, LESSER SENTENCE OF A 3RD. DEGREE MURDER CHARGE. WITH RESJUDICATA ON BEHALF OF, PETITIONER/ APPELLANT FOR RELIEF SEEKED.

5. (X) OR IT IS FURTHER ORDERED AND DECREED THAT THE SUPREME COURT WILL VACATE, THE JUDGMENT AND REMAND THIS CASE TO LOWER COURT TO ENTER A NEW VALID GUILTY PLEAD BARGIN WITH A LESSER AND LENIENT SENTENCE. (OF 3RD DEGREE OR LESSER SENTENCE) WITH RESJUDICATA ON BEHALF OF PETITIONER/ APPELLANT FOR RELIEF SEEKED.

RESPECTFULLY SUBMITTED,

/S/John A. Pace
JOHN A. PACE., #AY-6445.
S.C.I.H., P.O. DRAWER R,
HUNTINGDON, PA. 16652

NOTICE:

ALL THE FOREGOING ALLEGATIONS AND LITIGATIONS PREPARED HEREIN, (BY MARK, KING., A CERTIFIED PARALEGAL) ARE IN CONFORMITY WITH PA. BAR RULE #371. (SAVING, PROVISION FOR CERTIFIED PARALEGALS PER PA.BAR LICENSED ATTORNEYS) AND THROUGH APPROVAL OF PENNSYLVANIA BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF PA. AND AMERICAN BAR ASSOCIATION CONSTITUTION AND BYLAWS FOR PARALEGALS/LEGAL ASSISTANT ASSOCIATES (THAT SERVE IN THE LEGAL PROFESSION)

[EXHIBITS OMITTED]

IN THE SUPREME COURT OF PENNSYLVANIA.,
EASTERN DISTRICT PHILADELPHIA.

COMMONWEALTH OF PENNSYLVANIA.	:	
	:	SUPREME COURT NO.
APPELLEE	:	
	:	1992.
-v-	:	COMMON PLEAS COURT
JOHN A. PACE.	:	NO. 1272-1275 OCT. 1985.
	:	
APPELLANT.	:	

PROOF OF SERVICE.

I HEREBY CERTIFY THAT I AM THIS 26th DAY OF June 1992, SERVING THE FOREGOING BRIEF UPON PERSON AND IN MANNER INDICATED BELOW WHICH SERVICE SATIFY THE REQUIREMENTS OF PA. R.A.P. #121. BY FIRST CLASS U.S. MAIL TO:

DISTRICT ATTORNEY
OF PHILADELPHIA.
LYNNE ABRAHAM.
-DISTRICT ATTORNEY
PHONE NO.#(215)686-8000
APPEALS UNITS.
1421 ARCH STREET.
PHILADELPHIA,PA.19102
ATTENTION:
DONNA G. ZUCKER,
DEPUTY CHIEF/D.A.

/S/John A. Pace
JOHN A. PACE., AY-6445
S.C.I.H.
P.O. DRAWER R,
HUNTINGDON, PA. 16652

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

July 13, 1992

Charles W. Johns, Esquire
Prothonotary, Supreme Court of Pennsylvania
Room 468 City Hall
Philadelphia, Pennsylvania 19107

Re: **Commonwealth v. John A. Pace**
No. 81 E.D. Miscellaneous Docket 1992

Dear Mr. Johns:

Defendant has filed a Petition for Allowance of Appeal Nunc Pro Tunc from the Superior Court's March 30, 1992 affirmance of his convictions for murder and possessing an instrument of crime. Defendant had thirty days from that date to petition for allowance of appeal. Pa.R.A.P. 1113(a). As an appellate court may not enlarge the time for filing a petition for allowance of appeal, Pa.R.A.P. 105(b), defendant's petition must be dismissed. At this point, defendant's only vehicle for relief, if any, is pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §9541 *et seq*.

In any event, defendant's petition for allowance of appeal presents no issues that warrant this Court's review. Other than some vague claims of ineffectiveness, which fail to specify any particular action that counsel did or did not take, the issues raised in the petition are adequately disposed of in the Commonwealth's brief, a copy of which

is enclosed for the Court's convenience, and the opinions below.

Very truly yours,

/s/ Frances Gralnek Gerson
FRANCES GRALNEK GERSON
Assistant District Attorney

/jnj

cc: John A. Pace (Pro Se)

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 81
v.	:	E.D. MISCELLANEOUS
JOHN A. PACE	:	DOCKET 1992

PROOF OF SERVICE

I hereby certify that I am on this day serving the attached document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

SERVICE BY FIRST CLASS MAIL ADDRESSED AS FOLLOWS:

JOHN A. PACE AY-6445
S.C.I.H.
P.O. DRAWER R
HUNTINGDON, PA. 16652

Date: 7/13/92

/s/ Frances Gralnek Gerson
FRANCES GRALNEK GERSON, ESQUIRE
Attorney Identification No. 33469
1421 Arch Street
Philadelphia, Pa. 19102
Counsel for District Attorney
of Philadelphia County
(215) 686-5728

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA.	:	
v.	:	No. 81 E.D. Misc. Dkt. 1992
JOHN A. PACE.	:	
Petitioner	:	

ORDER

PER CURIAM:

AND NOW, this 3rd day of September, 1992, the Petition for Permission to File Petition for Allowance of Appeal Nunc Pro Tunc is denied and the Motion for Leave to File Reduced Copies is dismissed.

IN THE COURT OF COMMON PLEAS FOR THE COUNTY OF PHILADELPHIA, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

JOHN ALLEN PACE,
Petitioner

PETITION UNDER THE POST CONVICTION RELIEF ACT

Post Conviction appeal from the judgement of sentence entered February 13, 1986, by the Court of Common Pleas of Philadelphia County, Pennsylvania, October Term, No. 1272-1275.

John Allen Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

Pro Se

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
v.	:	OF PHILADELPHIA
JOHN ALLEN PACE,	:	COUNTY, PENNSYLVANIA
Defendant	:	Criminal Division
	:	Docket No.: 1272-1275
	:	October Term, 1985

MOTION FOR APPOINTMENT OF COUNSEL AND LEAVE TO PROCEED IN FORMA PAUPERIS

_____ Petitioner and Defendant in the above-captioned matter, hereby petitions this Honorable Court for appointment of counsel to assist Petitioner in the

furtherance of an appeal under the Post Conviction Relief Act and Chapter 1500, Pennsylvania Rules of Criminal Procedure. To avoid conflict of interest arising from included allegations of ineffectiveness of counsel, Petitioner further requests that appointed counsel not be affiliated with the office(s) or firm(s) of previous counsel in this matter.

Inasmuch as he is unable to retain counsel or to pay the fees and costs of an appeal, as certified in the attached Verified Statement, Petitioner moves this Honorable Court for leave to proceed *in forma pauperis* in furtherance of his petition under the Post Conviction Relief Act.

Respectfully submitted,

_____ /S/ _____

Date

John A. Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

COMMONWEALTH OF PENNSYLVANIA Respondent v. JOHN ALLEN PACE, Defendant	: : : : : : :	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA Criminal Division Docket No.: 1272-1275 October Term, 1985

VERIFIED STATEMENT

_____ Petitioner and Defendant in the above-captioned matter, states under penalties provided by 18 Pa.C.S. §4904 that:

1. I am the petitioner in the above-captioned action and because of my financial condition, I am unable to pay the following fees and costs:

(a) retention of counsel.

(b) costs of producing transcripts and records;

(c) other fees and costs associated with this appeal.

2. The following statements relating to my ability to pay the fees and costs of prosecuting this appeal are true and correct:

(a) I am not presently employed except for a prison industries job;

(b) I have received no income within the past twelve months other than my prison wages;

(c) I have $___ in my prison account.

Respectfully submitted,

_____ /S/ _____

Date

John A. Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

COMMONWEALTH OF PENNSYLVANIA v. JOHN ALLEN PACE, Defendant	: : : : : : :	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA Criminal Division Docket No.: 1272-1275 October Term, 1985

MOTION UNDER THE POST CONVICTION RELIEF ACT

THE HONORABLE, THE JUDGES OF THE COURT:

The Motion of John Allen Pace ("Defendant"), pro se, respectfully represents:

1. Defendant's name is John Allen Pace, Parole Number 8358S.

2. Defendant presently is confined at the State Correctional Institution at Huntingdon, Pennsylvania.

3. Defendant was sentenced for the offenses of Murder of the second degree and possession of an instrument of crime.

4. Defendant was sentenced on February 13, 1986.

5. Defendant was convicted following a guilty plea.

6. Defendant is now serving the sentence imposed at Docket No. 1272-1275, October term, 1985, at a total term of confinement of life with no stated minimum sentence for parole eligibility.

7. Defendant was sentenced by the Honorable David N. Savitt, who presided at both the receipt of the guilty plea and sentencing.

8. Defendant had instituted the following proceedings (listed by the court, caption, term and number) which have been completed, to obtain relief from his sentence:

(a) Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania v. John Allen Pace, 1986, No. 1272-1275, October Term, 1985, – Petition for relief under the Post Conviction Hearing Act; denied.

(b) Superior Court of Pennsylvania, Commonwealth of Pennsylvania, 1991, No. 02429 Philadelphia – Appeal of Denial of Petition under Post Conviction Hearing Act; denial affirmed.

(c) Supreme Court of Pennsylvania, Commonwealth of Pennsylvania, 1992, No. 81 E.D. Misc. Dkt. – Petition for Permission to File Petition for Allowance of Appeal Nunc Pro Tunc; petition denied.

9. Defendant was represented by the attorneys listed below, with the stage of the case in which each represented Defendant indicated.

Moira Dunworth, Esquire – arrest through sentencing.

Franklin D. Green, Esquire – first Post Conviction Hearing Act; withdrew representation for personal reasons while motion was being held under advisement.

David Rudenstein, Esquire – appointed after Attorney Green withdrew; represented Defendant through appeal to Superior Court.

10. Defendant respectfully requests that he be granted the following relief:

(a) withdrawal of the unconstitutionally-induced guilty pleas;

(b) an evidentiary hearing;

(c) correction of the sentence of life imprisonment so as to include an explicit minimum term that will engender parole eligibility.

11. The grounds for the relief requested by Defendant, as set forth in Paragraph 10, are as follows:

(a) The pleas of guilty to Murder of the second degree and Possession of an instrument of crime were unlawfully induced by circumstances that make it clear that the inducement caused Defendant to plead guilty. Neither the court nor counsel ensured that Defendant understood that a consequence of his plea could or would be imposition of that term of life imprisonment without a minimum sentence for parole eligibility. Germanely, Defendant is factually innocent of post-1982 first or second degree *arson*-murder, which is the sole offense under state penal statutes for which life imprisonment without parole eligibility is authorized;

(b) An unlawful sentence of life imprisonment without a discretionary minimum sentence for parole eligibility was imposed upon Defendant;

(c) The failure to litigate these issues during the colloquy procedures or on appeal could not have been the result of any strategic or tactical decision by counsel, thus denying Defendant effective assistance of counsel at all levels of representation; in the alternative, the Superior Court did not determine until 1992, in a case characterized as one of "first impression," that a sentence of life imprisonment is a mandatory minimum, thus precluding a challenge to that holding prior to 1992. Ineffective assistance of counsel, in the circumstances of the instant case, so undermined the truth determining process that no reliable adjudication of the guilt or innocence of the Defendant could have taken place;

(d) Violations of the Constitution of Pennsylvania, the laws of the Commonwealth, and the Constitution of the United States, in the circumstances of this particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence, nor fairness in sentencing could have taken place, and these violations would require the granting of federal habeas corpus relief; and

(e) Supplemental grounds that may be added in the interest of justice subsequent to the advice of appointed counsel.

12. The facts supporting each ground for the relief requested by Defendant are listed below:

i. The following facts supporting a ground for relief appear in the record:

Defendant entered a plea of guilty in open court to the charges of second degree murder and possession of an instrument of crime. Defendant subsequently received a life sentence without a stated minimum sentence for parole eligibility. Both the court and trial counsel failed to ascertain on the record whether Defendant understood the nature and consequences of his guilty plea.

ii. The following facts supporting a ground for relief don't appear in the record but are evidenced by documents attached to the instant Motion as Exhibits:

Prior to Defendant entering his guilty plea, counsel Dunworth met with Defendant's biological parents and brother to discuss the Defendant's case and secure the family's support, since the Defendant was still a juvenile. Attorney Dunworth informed Defendant's family that it

was her professional opinion that the Defendant should plead guilty to second degree murder. Attorney Dunworth also informed the family that the Defendant would have to serve up to ten years before he would be eligible for parole. Based on their understanding of counsel's statements, the family advised the Defendant to plead guilty to second degree murder. [See Affidavits at Exhibits A, B and C].

That counsel misinformed both the Defendant and his family is further substantiated in a letter the Defendant received from his PCRA counsel, David Rudenstein, wherein Attorney Rudenstein states that, ". . . your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family." [See Exhibit D] At the March 26, 1991, PCHA evidentiary hearing, Defendant asked Attorney Rudenstein to call trial counsel Dunworth to the stand and ask her why she misled him and his family about the possibility of parole, but Attorney Rudenstein did not call her.

Guilty plea counsel Dunworth was ineffective for failing to explain the consequences of Defendant's guilty plea and for failing to challenge the legality of a life sentence without a stated minimum sentence for parole eligibility. PCRA and Superior Court counsels Franklin D. Green and David Rudenstein were ineffective for failing to raise these issues and for failing to raise guilty plea counsel Dunworth's ineffectiveness for failing to raise these issues on direct appeal.

13. The issues raised in this Motion have not been fully litigated or waived for the following reasons:

Defendant never had the requisite knowledge to execute a voluntary waiver of the issues or to litigate the issues prior to this time. The Superior Court and Supreme Court of Pennsylvania have not ruled on the merits of these issues. Extraordinary circumstances, including the denial of effective assistance of counsel, exist that justify Defendant raising these issues at this time. This motion should not be dismissed without a hearing for the reason that the issues raised in this motion were never raised in Defendant's first PCRA petition and Defendant has alleged the ineffectiveness of all prior counsel for failing to raise the issues contained in this motion, thus alleging extraordinary circumstances to justify failure to raise the issues prior to the present. Thus such issues have not been waived.

The course of actions and omissions by Defendant's three previous counsel had absolutely no reasonable basis designed to promote Defendant's interest. A grave miscarriage of justice occurred when Defendant pleaded guilty believing that, by doing so, he would be eligible for parole some day.

A sentence of life imprisonment without a stated minimum sentence for parole eligibility imposes an unlawful sentence and constitutes cruel and unusual punishment, as well as denies due process and equal protection of law in violation of the Constitution of the United States and Pennsylvania, thus creating fundamental and manifest error. U.S. Const. amends. VI and XIV; Pa. Const. Art. 1, §9.

Defendant's right to a trial by jury secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 6 and 9, of the Pennsylvania Constitution, was violated when Defendant

entered his plea of guilty unknowingly, unintelligently, involuntarily, and without a full understanding of the rights he was waiving.

Trial counsel was constitutionally ineffective for failing to insure that Defendant understood the consequences of his pleading guilty to second degree murder, to challenge the legality of the life sentence that was given without a stated minimum sentence for parole eligibility, and to file a motion to withdraw the plea based on these issues, thereby depriving Defendant of his right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Pennsylvania Constitution. Such ineffective assistance of counsel so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

PCRA counsel Franklin Green was constitutionally ineffective for failing to raise the issues set forth in the instant PCRA Motion, and raise trial counsel's ineffectiveness for failing to raise these issues on direct appeal. Replacement PCRA counsel Rudenstein likewise was constitutionally ineffective for failing to raise the issues set forth in the instant PCRA Motion, to call Attorney Dunworth to testify at the evidentiary hearing when he knew, first hand, that Attorney Dunworth had failed to inform Defendant that his pleading guilty to a life sentence would mean that he would never be eligible for parole, and to raise Attorney Green's and Dunworth's ineffectiveness for failing to raise these issues. All three of Defendant's prior counsel deprived him of his right to effective assistance of counsel secured by the Sixth and

Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Pennsylvania Constitution.

WHEREFORE, Defendant respectfully requests that this Honorable Court grant this Motion for the relief requested in Paragraph 10, *supra*.

Respectfully submitted,
/s/ John A. Pace
John A. Pace, Pro se
1100 Pike Street, AY6445
Huntingdon, PA 16654

VERIFICATION

I, JOHN ALLEN PACE, do hereby verify that the facts sets forth in the above motion are true and correct to the best of my personal knowledge or information and belief, and that any false statements herein are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. §4904), relating to unsworn falsification to authorities.

/s/ John A. Pace
John Allen Pace
1100 Pike Street, AY6445
Huntingdon, PA 16654

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	
JOHN ALLEN PACE, Defendant	:	Criminal Division
	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania	:	
	:	ss
County of Philadelphia	:	

I, DOROTHY CLEMMONS, hereby certify that:

1. I am the biological mother of John Allen Pace, and I reside at 6125 Yocum Street, Philadelphia, Pennsylvania, 19143.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

/s/ Dorothy Clemmons
Dorothy Clemmons

I, DOROTHY CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96
Date

/s/ Dorothy Clemmons
Dorothy Clemmons

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	
JOHN ALLEN PACE, Defendant	:	Criminal Division
	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, MORRIS CLEMMONS, hereby certify that:

1. I am the biological father of John Allen Pace, and I reside at 1537 N. 54 Street, Philadelphia, Pennsylvania, 19131.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

I, MORRIS CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96 /s/ Morris Clemmons
Date Morris Clemmons

EXHIBIT C

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	
JOHN ALLEN PACE, Defendant	:	Criminal Division
	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, HUGH PACE, hereby certify that:

1. I am the biological brother of John Allen Pace, and I reside at 5915 Baynton Street, Philadelphia, PA 19144.

2. Between October and February of 1985-86, I, along with my parents, met with my brother's attorney,

Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my brother's criminal case in the above captioned matter.

3. Because my brother was a juvenile at the time, Attorney Dunworth was consulting with my parents and me to determine what was best for my brother. It was during one of these meetings that Attorney Dunworth advised me that my brother should plead guilty to second degree murder. Attorney Dunworth asked us to talk to my brother and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my brother pleaded guilty to second degree murder, he would be out of prison after ten years.

5 Because my parents and I believed Attorney Dunworth's statement that my brother would be eligible for parole sometime after serving ten years if he pleaded guilty to the second degree murder charge, I, along with my parents, advised my brother to enter the guilty plea which he subsequently did do.

11/5/96 /s/ Hugh D. Pace
Date Hugh Pace

I, HUGH PACE, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96 /s/ Hugh D. Pace
Date Hugh Pace

EXHIBIT D

David S. Rudenstein
Attorney At Law

[Address Omitted In Printing]

May 21, 1990

PLEASE RESPOND TO:

Mr. John Pace
AY-6445
Box 200
Camp Hill, PA 17001-0200

RE: Commonwealth vs. Pace

Dear Mr. Pace:

Please be advised that I am in receipt of your letter, dated May 5, 1990. I have reviewed the issues raised there in and I do think that I have raised these issues with the P.C.R.A. Court, but, at the same time, I just hope that I have not misunderstood anything in your letter. Basically, the main issue that I have raised with the P.C.R.A. Court was that your plea was not voluntary or knowing because it was never explained to you that Life in Pennsylvania meant Life without parole.

There were also other issues that I would have liked to have placed on the record via an evidentiary hearing, to wit, your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family. However, because Judge McCrudden denied me an evidenciary hearing, this is not of record.

I am sure the Judge will be denying our petition, thereafter, I will file notice of appeal to Superior Court raising the issues I have raised in the P.C.R.A. petition and will of course, also ask for an evidenciary hearing.

Thank you.

Very truly yours,

/s/ David Rudenstein
David Rudenstein

DSR/mer

COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	Criminal Division
	:	Docket Nos.: 1272-1275
v.	:	October Term, 1985
JOHN ALLEN PACE, Defendant	:	

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION UNDER POST CONVICTION RELIEF ACT

John Allen Pace 1100
Pike Street, AY6445
Huntingdon, PA 16654
Pro Se

I. *TERMS OF LIFE IMPRISONMENT IMPOSED WITHOUT A DISCRETIONARY MINIMUM TERM FOR PAROLE ELIGIBILITY FOR CRIMES EXCEPT FIRST AND SECOND DEGREE ARSON-MURDER ARE ILLEGAL.*

Limited solely to sentence rather than conviction, this issue is a challenge to the legality and constitutionality of the mandatory sentence imposed and, therefore, could not have been waived. 42 Pa.C.S.A. §9781; *Commonwealth v. Campbell*, 351 Pa.Super. 56, 505 A.2d 262 (1986). Where the court failed to inform the defendant of his right to file a motion challenging the propriety of a mandatory sentence of life imprisonment without parole, the issue of the constitutionality of a life sentence has not been waived because it is essentially an attack on the legality of the sentence. *Commonwealth v. Middleton*, 320 Pa.Super. 533,

543 n. 5; 467 A.2d 841 (1993); Pennsylvania Rules of Criminal Procedure, Rule 1405(c)(2).

The Honorable Judge Savitt sentenced Defendant Pace to a term of life imprisonment for second degree murder without an established minimum sentence for parole elgibility. Assuming, for the sake of this argument only, that the court properly sentenced the Defendant to a life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by 42 Pa.C.S., § 9756(c). That section provides:

> (c) Prohibition of Parole. – Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because Pace was not convicted of first degree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under § 9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. 1 Pa.C.S. §1924. ("Exceptions expressed in a statute shall be construed to exclude all others.") As held in *Commonwealth v. Bell*, 512 Pa. 334, 516 A.2d 1172, 1175 (1986), applying 1 Pa.C.S. § 1921(b), when statutory language is clear, the

judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although § 9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which, on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole any person serving life imprisonment. That statute, 61 Pa.Stat. Section 331.21, provides that:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, 61 Pa.Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of Title 42 and 331.21 of Purdon's Title 61, although codified in different titles of the Pennsylvania penal law, are statutes "*in pari materia*" because they "relate to the same persons or things or to the same class of persons or things." 1 Pa.C.S. § 1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are "*in pari materia*" with one another and with the relevant sections of Title 61, and should be read together, in a manner that, "if possible, [gives] effect to all [their] provisions." 1 Pa.C.S. §1921(a).

At first reading 42 Pa.C.S. §9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the Defendant have been convicted of second degree murder and face life sentences, to a non parole eligible sentence; the latter prohibits the parole board from releasing prisoners serving life terms. Yet read and applied in relation to the pertinent portions of the Crimes Code and according to the Commonwealth's codified principles of statutory construction, the two statutes are, in fact, reconcilable.

There are two methods of reconciling the statutes to give both of them effect. The first is to recognize that in 1941, when the Title 61 provisions were enacted, Act of August 6, 1941, P.L. 861, the offense of murder of the first degree was the only offense for which a term of life imprisonment was provided. Section 9756(c) was not enacted until 1974. Act of Dec. 30, P.L. 1052, No. 345, transferred to Title 42 and recodified by Act of Oct. 5, 1980, P.L. 693, No. 142, § 401(a). Giving effect to the language of § 9756(c), it becomes clear the General Assembly did not intend to extend the reach of §331.21 to cover life sentences imposed in other than first degree murder cases. Thus, the enactment of what is now §9756(c) as part of the same 1974 criminal code reform that separated felony murder from willful and premeditated-murder establishes parole eligibility in those cases.

The other method of reconciling Sections 9756(c) and 331.21 involves a careful examination of the life terms provided in the Crimes Code. The legislature has specified that the terms of life imprisonment provided for certain aggravated types of murder shall be without parole. For

example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provisions of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*"; the same is provided for arson-related murder in the second degree. In contrast, in Section 9715, under which Pace was sentenced, no such prohibition appears, nor does it in 18 Pa.C.S. § 1102(a) or (b), which provides terms of life imprisonment for murder in the first and second degree. This demonstrates that the legislature was explicit about prohibiting parole where it intended to do so. *Cf.* 1 Pa.C.S. Section 1924 ("Exceptions expressed in a statute shall be construed to exclude all others.") It did not intend to bar for life terms imposed, *inter alia*, under Section 9715.

When this statutory scheme is construed with Sections 9756(c) and 331.21, it becomes clear that where the latter section provides parole release for "convicts . . . serving life imprisonment," it must be read as referring to those offenses for which the legislature has specified terms of life imprisonment without right to parole. This reading that "[w]henever a general provision in a statute [the provision in Section 331.21] shall be in conflict with a special provision in . . . another statute [the opposite prohibition in Section 9756(c)], the two shall be construed, if possible, so that effect may be given to both." 1 Pa.C.S. Section 1933.

Alternatively, Sections 9756(c) and 331.21 may be seen as irreconcilable. The principle of statutory construction that statute "*in pari materia*" should be construed together is not absolute; the statute says this shall be done "if possible." 1 Pa.C.S. Section 1932(b). If it is not possible to give effect to both of these statutes, then Section 331.21,

as it pertains to persons serving life sentences for all offenses except first degree murder, must be seen as implicitly repealed, in pertinent part, by the later-enacted Section 9756(c). Under 1 Pa.C.S. Section 1936, "[w]henver the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." See also 1 Pa.C.S. Section 1971 ("a later statute shall not be construed to supply or repeal an earlier statute unless the two statutes are irreconcilable." Section 9756(c) of Title 42 was enacted after Section 331.21 of Title 61, as discussed above. See also 1 Pa.C.S. Section 1928(b)(1) (penal provisions shall be strictly construed); *Commonwealth v. Darush*, 256 Pa.Super. 344, 389 A.2d 1165, 1158 (1978) (strict construction is in favor of defendant); *Commonwealth v. Cluck*, 252 Pa.Super. 228, 381 A.2d 472, 477 (1977) (any ambiguity in penal statutes must be resolved in favor of life and liberty).

In *Castle v. Pennsylvania Board of Probation and Parole,* 123 Pa.Comw. 570, 554 A.2d 625 (1989), *all app. denied*, 567 A.2d 653 (1989), an action by a prisoner to compel the scheduling of a parole hearing, the other intermediate appellate court rejected the argument that Section 9756(c) gave the defendant, there serving a life sentence for second-degree murder, a right to parole consideration and thereby impliedly repealed the contrary provisions in 61 Pa.Stat. Section 331.21. *Id.* at 628-29. The basis of its decision was the asserted lack of a stated purpose of Section 9756 to create parole eligibility, and the fact that the section only governs action by the trial court and not the parole board, whereas Section 331.21 prohibits the board from paroling prisoners serving life terms. *Id.*

For these reasons, the court did not find the two statutes "clearly irreconcilable," a prerequisite for finding repeal by implication. *Id.* at 629.

This court should decline to follow *Castle* here for two reasons. First, the *Castle* court was incorrect in stating that Section 9756 did not have as its purpose the creation of parole eligibility. Subsection (c) of that section is entitled "Prohibition of Parole," and expressly concerns parole eligibility. It lists specific instances in which the court may sentence without the right to parole, stating that these are the "only" such instances. In light of the codified principle of statutory construction that exceptions expressed in a statute exclude all others, 1 Pa.C.S Section 1924, it is clear that this subsection had as its purpose to and did create parole eligibility for all offenses not specified.

Second, because the General Assembly did intend Section 9756(c) to create parole eligibility, the *Castle* court was wrong in deciding that it was not irreconcilable with Section 331.21. Thus, we are left with the anomaly of one statute providing a right to parole, and another prohibiting the only body empowered to release on parole from doing so. It is presumed that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. Section 1922(1). The result of *Castle* is all three of these. In any event, this appeal *does* concern action of the sentencing court, which *is* expressly bound by Section 9756(b) and (c). Thus, at the least, this case may be readily distinguished on that basis.

All sentences imposed in Pennsylvania are for the maximum sentence. Maximum sentences are the "legal and valid" sentences imposed. *Commonwealth v. Daniels*, 430 Pa. 442, 243 A.2d 400 (1968). "The word 'sentence'

when unmodified by the words 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence." *Commonwealth v. Glover,* 397 Pa. 543, 546-47, 156 A.2d 114 (1959). "The legislature has the right to fix the maximum penalty and likewise can, if it sees fit, name the minimum." *Id.* at 5454. "When the legislature has desired to provide for a mandatory minimum in the past it has done so in unequivocal language." *Id.* at 547. The General Assembly has confirmed the *Glover* Court's analysis by subsequently adopting the Mandatory Minimum Sentencing Act, 42 Pa.C.S.A. Sections 9712, 9713, 9714, in which specific sentences are deemed to be mandatory minimum sentences, none of which include sentences of life imprisonment. If minimum sentences "are not implicated much less mandated by the sentencing statute, then the discretion of the trial court is necessarily the controlling factor." *Commonwealth v. Button*, 332 Pa.Super. 239, 244; 481 A.2d 342 (1984).

The legislature clearly intended to distinguish punishment for first-degree murder and second-degree felony murder from other criminal offenses, a goal accomplished by mandating the harshest *maximum penalty* of total confinement available. Inasmuch as the Statutory Construction Act, 46 P.S. Section 558, requires that all "penal provisions" be strictly construed in such a way that " . . . when a criminal statute calls for construction it is not the construction that is supported by the greater reason that is to prevail, but that one which, if reasonable, operates in favor of life and liberty . . . " *Commonwealth v. Glover*, supra; *Commonwealth v. Pristas*, 222 Pa.Super. 254, 260-61; 295 A.2d 114 (1972). 18 P.S. Section 4701, 18 Pa.C.S.A. Sections 1102 and 2502, and 42 Pa.C.S.A. Section 9711, must be deemed to mandate only maximum sentences of

life imprisonment, not minimum sentences as construed by courts and administrative agencies. It is apparent that the Superior Court views life sentences in Pennsylvania to be parole eligible inasmuch as the seven states cited by that Court as rationale for the constitutionality of consecutive sentences *all* provide for life sentences with specific minimum sentences, four which have no provision for "life without parole." *Commonwealth v. Button,* supra, at 245, n. 1.

This construction of the above cited statutes is a reasonable one that "operates in favor of life and liberty." First, imposition of a sentence without a stated minimum results in a "flat" sentence with an implied minimum of one day prior to June 27, 1978. *Commonwealth v. Ulbrick*, 462 Pa. 257, 258; 341 A.2d 68 (1978); *Commonwealth v. Butler*, 458 Pa. 289, 294; 328 A.2d 851 (1974); *Commonwealth v. Auschbacher*, 276 Pa.Super. 554, 556; 419 A.2d 596 (1980). Second, life-sentenced prisoners are not precluded from the benefit of 19 Pa.C.S. Section 1957 and 19 P.S. Section 1057:

> Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a state penitentiary . . . the court . . . shall pronounce upon such convict a sentence of imprisonment for an indefinite term stating in such sentence the minimum and maximum limits thereof . . . "

Commonwealth v. Butler, supra., at 291. The only parameters placed upon the minimum sentence to be imposed by the court is that "the minimum shall never exceed one-half of the maximum sentence." 19 P.S. Section 1057; 42 Pa.C.S.A. Section 9756(b). This implies that the only minimum sentence precluded by these statutes when the

maximum sentence is life imprisonment is "life" itself, the very sentence presumed by the judiciary and administrative agencies.

Certainly a sentencing court may not sentence one convicted of second-degree felony murder to a lesser *maximum* sentence than life imprisonment. The *Castle* court erred by assuming that sentences of life imprisonment are other than simply maximum sentences. Given that two purposes of the Crimes Code, 18 Pa.C.S.A. Section 104(3)(5), effective June 6, 1973, are to "safeguard offenders against excessive, disproportionate, or arbitrary punishment" and "to differentiate among offenders with a view to just individualization in their treatment," and that components of the Crimes Code are to be construed in terms of these purposes, it is necessary to reconcile 18 P.S. Section 4701, 19 P.S. Section 1057, 19 Pa.C.S. Section 1957, 18 Pa.C.S.A. 1102, 1321(e) and 2502, and 42 Pa.C.S.A. Sections 9711 and 9756, inasmuch as none preclude another. "While [parole] is an amelioration of punishment, *it is in legal effect imprisonment. Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 589; 28 A.2d 897 (1942); *Anderson v. Corall*, 26 U.S. 193, 196; 44 S.Ct. 43 (1923). If, under Pennsylvania law, a sentence to a five to ten year term of imprisonment is considered a ten-year sentence, (*United States ex rel. McNeils v. Pa. Board of Parole*, 141 F.Supp. 23 (1956), a sentence of one day to life imprisonment must be considered a sentence of life imprisonment and, therefore, in compliance with the foregoing statutes.

An overview of the foregoing statutes, either individually or *in pari materia*, raises reasonable constructions that favor life and liberty much more than past and current interpretations. First, the Parole Act, adopted

August 6, 1941, and amended to create the Pennsylvania Board of Probation and Parole December 27, 1965, has been explicitly repealed insofar as it is inconsistent with subsequent legislation, that is, with the phrase "or serving life imprisonment,' as found at 61 P.S. Section 331.21. The most noteworthy statutory refinement regarding parole eligibility for sentences of life imprisonment is found in the clear and concise language of 42 Pa.C.S.A. Section 9756, effective March 30, 1975. In Section 9756(c), the General Assembly very succinctly defined these offenders to whom parole elgibility *must* be afforded and those to whom the right to parole *may* be provided. Even the most cursory perusal of Section 9756(c) dictates the conclusion that, except for four (4) specific categories of offenses, the court may impose a sentence with parole eligibility.. Conspicuously absent from that group of four offenses are second-degree felony murder [18 Pa.C.S.A. Section 2704], and a subsequent conviction for an unrelated homicide [42 Pa. C.S.A. Section 9715], all of which mandate a sentence of life imprisonment. "A change of language in subsequent statutes on the same matter indicates a change of legislative intent." *Haughey v. Dillon*, 379 Pa. 1, 6; 108 A.2d 69 (1954); *Commonwealth v. Garcia*, 474 Pa. 449, 477; 378 A.2d 1199 (1977). Therefore, if the court properly sentenced Defendant Pace to a life term, it violated 42 Pa.C.S. Section 9755(b) and (c) by failing to set a minimum sentence, at the completion of which Defendant would be eligible for parole.

II. GUILTY PLEA COLLOQUY THAT FAILED TO ENSURE PETITIONER UNDERSTOOD CONSEQUENCES OF PLEA COMPELS WITHDRAWAL OF PLEA.

If the conclusion of the *Castle* Court that terms of life imprisonment imposed are mandatory minimum sentences, then this Honorable Court erred by accepting Defendant's guilty plea without informing him or insuring that he understood that a consequence of his plea would be a term of life imprisonment without parole. Defendant did not know that a consequence of his plea would be to spend the remainder of his life behind bars without becoming eligible for parole. Had he known, he would not have pleaded guilty. Such a defective colloquy violated the requirements of Pa.R.Crim.P. 319 and the due process provisions of the Constitutions of the United States and Pennsylvania.

The United States Supreme Court has consistently applied stringent standards for testing the validity of a guilty plea; that is, that it was made voluntarily after proper advice and with full understanding of the consequences of the plea. *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969).

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable of canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences.

Boykin v. Alabama, 385 U.S. 238, 244; 89 S.Ct. 1709, 1712 (1969).

Pa.R.Crim.P. 319, the goal of which is "assurance that a defendant's guilty plea is tendered knowingly, intelligently, voluntarily and understandingly," [*Commonwealth v. Persinger*, 532 Pa. 317, 322, 615 A.2d 1305 (1992)], is but a restatement of this constitutional principle as well as existing law and practice. As the Third Circuit has said:

> We therefore reach the same conclusion as did the Ninth Circuit in Munich v. United States, 337 F.2d 356 (1964): "[O]ne who, at the time of entering a plea of guilty, is not aware of the fact that he would not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea."

Berry v. United States, 412 F.2d 189, 193 (3rd Cir. 1969). Thus, failure to advise Defendant of the consequences of his plea – ineligibility for parole – is equal to a denial of due process. "[P]rejudice inheres when an accused pleads guilty, thus convicting himself of a criminal offense, without understanding the significance or consequences of his action." *Id.* at 191.

The mandate of Pa.R.Crim.P. 319, as well as its federal counterpart, Fed.R.Crim.P.11, is designed to ensure that the pleader is apprised, at the very least, of the period of *required* incarceration. Loss of parole eligibility is "an inseparable ingredient of the punishment imposed." *Id.* at 192; *In re Grand Jury Investigation,* 542 F.2d 166, 173 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977). Failure to impart information regarding "'the worst to expect,'" in terms of imprisonment is a failure to explain the consequences of a plea. *Roberts v. United States,* 491 F.2d 1236, 1238 (3rd Cir. 1974). The worst conceivable term of imprisonment is life imprisonment without parole.

Ordinarily, it would not be necessary for a trial court to include an explanation of probation or parole in its inquiry into a defendant's understanding of his plea. However, circumstances surrounding a plea that mandates a sentence of life imprisonment without the possibilty of parole is not ordinary. The particular status of such defendants brings into mechanical operation a legislative directive severely restricting the freedom of action of the sentencing judge as well as the parole authority. "Under such circumstances, the knowledge of ineligibility for parole is as necessary to an understanding of the plea as is the knowledge of the maximum sentence possible." *Berry v. United States,* 412 F.2d 189, 192-193 (3rd Cir. 1969).

This constitutional principle was applied to Pennsylvania law by the Third Circuit Court of Appeals in *United States ex rel. Crosby v. Brierley,* 404 F.2d 790 (3rd Cir. 1968), *overruled by United States ex rel. Grays v. Rundle,* 428 F.2d 1401 (3rd Cir. 1970). The *Crosby* Court stated that Pa.R.Crim.P. 319 anticipates:

> . . . an inquiry of the defendant to form the factual basis that the plea is "competently and intelligently made" . . . . Trial courts have a duty . . . to insure that the defendant understands the consequences of his plea. This is not so much the result of promulgations of federal and state rules of criminal procedure as it is a part of the basic concepts of proper judicial admininistration in Pennsylvania. . . .

Id. at 794. The rationale of *Berry,* that failure to advise a defendant, prior to acceptance of guilty plea, of ineligibility for parole denies due process, was adopted by the Pennsylvania Supreme Court in *Commonwealth v. Zuber*, 466 Pa. 453, 461; 353 A.2d 441, 445 (1976).

The mandatory nature of Rule 319 was clearly established in *Commonwealth v. Ingram*, 455 Pa. 198, 316 A.2d 77 (1974). Other cases indicate that six specific areas of inquiry must be explored, the most relevant being whether the defendant is aware of the permissible range of sentences for the offenses charged. *Commonwealth v. Willis,* 417 Pa. 50, 52, 369 A.2d 1189 (19977); *Commonwealth v. Fay,* 294 Pa.Super. 332, 337, 439 A.2d 1227 (1982). Lack of such inquiry or notice deprives the defendant of "the right to weigh the alternatives of going to trial versus entering a guilty plea . . . because of the real possibility . . . that he was misled or acted pursuant to inaccurate or incorrect information" [*Commonwealth v. Leonhart,* 358 Pa.Super. 494, 501, 517 A.2d 1342 (1986)] and requires that the defendant be allowed to withdraw his guilty plea. *Commonwealth v. Kulp,* 476 Pa. 358, 382 A.2d 1209 (1978). Before accepting a plea of guilty, the court must insure that the defendant understands the meaning of words like "consecutive". *Commonwealth v. Guyton,* 331 Pa.Super. 231, 480 A.2d 330 (1984). No less important are words and phrases like *life imprisonment* and *mandatory minimum sentences.* "[N]o plea can be viewed as voluntary that is the product of ignorance." *Commonwealth ex rel. West v. Myers,* 423 Pa. 1, 5-6, 222 A.2d 918 (1966).

The explicit purpose of the Crimes Code, "to give fair warning . . . of the sentences that may be imposed on conviction of an offense," is relevant.18 Pa.C.S. §104(4). Significantly, the ABA Standards For Criminal Justice, Second Edition at 14-1.4, provides the following:

> (a) The Court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:

> . . . . (ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the *mandatory minimum sentence*, if any, on the charge, or any special circumstances affecting probation or release from incarceration. (emphasis added)

Commonwealth v. Persinger, 532 Pa at 323-24, held that the reasoning behind the above Standard is sound because it insures that the defendant appreciates the significance and consequences of his plea. See also *Commonwealth v. Fay*, 294 Pa.Super. at 237. The *Persinger* Court went on to hold that failure of the trial court to abide by this Standard results in the defendant suffering *manifest injustice*. Defendant contends that such miscarriage of justice mandates that neither "delay" nor "multiple petitions" bar PCRA or federal habeas corpus challenges to this denial of due process.

Analogous to 42 Pa.C.S. §9718, Sections 4701, 1102, 2704, and 9715 contain no notice requirement prior to imposition of a mandatory minimum term of life imprisonment. However, "there can be no mistake that notice of intention to pursue a mandatory minimum sentence under §9718 is necessary . . . before acceptance of guilty plea. Moreover, it is clear that such a requirement is born not of legislative enactment, but rather from judicial interpretation of due process guarantees whose purposes are to inform defendant of *all* of the consequences of entering a guilty plea before the act has become *fait accompli* . . . What is important is that Appellant was made aware of the consequences of his action *prior* to the acceptance of his plea." *Commonwealth v. Boyles*, 414 Pa.Super. 282, 293, 606 A.2d 1201.

A guilty plea may be attacked after sentencing on three grounds: legality of sentence, jurisdiction of the court, and the voluntary, knowing, and intelligent nature of the guilty plea itself. *Commonwealth v. Alston*, 387 Pa.Super. 393, 564 A.2d 235 (1989). In determining whether a guilty plea is voluntarily and understandingly entered, it is mandatory that the court ask questions to ascertain the defendant's awareness of the permissible range of sentences. *Commonwealth v. Persinger*, 532 Pa. at 321. The absence of this inquiry from the transcripts renders the colloquy defective which, in turn, provides adequate grounds for withdrawal of the plea. Counsel's failure to seek withdrawal of Defendant's plea was, therefore, prejudicial to Defendant. *Id.* at 234.

In the instant case, this Honorable Court failed to advise Defendant that a consequence of his plea would be a mandatory minimum term of life imprisonment. The Court only made reference to the maximum penalty:

> Q [THE COURT]; If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment. Do you understand that?
>
> A Yes.

TT: 43. Defendant was unaware that the forfeiture of his right to a trial by jury would result in his removal from society, without eligibility for parole, for the remainder of his life.

That Defendant was misinformed about the consequences of his plea is also evident by the comments guilty plea Attorney Dunworth made to Defendant's PCRA/ Superior Court counsel, David S. Rudenstein:

> .... your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family.

[Exhibit D in the instant PCRA Motion]. Attorney Dunworth's statement to Attorney Rudenstein makes it clear that she did not inform Defendant that he was pleading guilty to a life sentence without parole eligibility. Moreover, her statements to both the Defendant and his family [Exhibits A, B and C in the instant PCRA Motion] that he would be eligible for parole sometime after serving ten years was completely misleading and inaccurate to Defendant. In *Strader v. Garrison*, 611 F.2d 61, 65 (1979), the Forth Circuit held that, "[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel;" see also *Sparks v. Sowders,* 852 F.2d 882, 885 (6th Cir. 1988).

Whether the Court was aware or unaware that Defendant Pace's understanding was factually and legally incorrect may be irrelevant. What is relevant is that the Court allowed Defendant to plead guilty believing he would be eligible for release after serving a certain amount of time. Had Defendant known of the true and correct nature of the penalty, he would not have pleaded guilty. The Court's acceptance of his guilty plea under these circumstances and others, then, was a complete miscarriage of justice warranting the withdrawal of the plea because before a guilty plea is accepted, a defendant must

be aware of the outer limits of the punishment and the full consequences of the plea.

III. INEFFECTIVE ASSISTANCE OF COUNSEL AT ALL LEVELS OF REPRESENTATION RESULTED IN DENIAL OF DUE PROCESS.

The threshold inquiry into claims of ineffective assistance of, counsel is: (1) does the underlying issue have merit, (2) was the course chosen by counsel designed to effect Defendant's interests, and (3) did counsel's omission prejudice Defendant. *Commonwealth v. Persinger*, 532 Pa. at 321.

In addition to the substantive defects in the plea colloquy set out previously, Defendant contends that trial counsel was ineffective for failing to correct these defects prior to the entry of his plea. This ineffective assistance of counsel caused defendant to enter his plea unknowingly, unintelligently, involuntarily, and without a full understanding of the consequences.

Trial counsel was ineffective for failing to insure that the Defendant understood the terms and consequences of the plea, explain or have the court explain that a life sentence was a mandatory minimum sentence without parole eligibility, challenge the legality of the life sentence without a stated minimum sentence for parole eligibility, and file an appeal. Additionally, counsel's misleading and inaccurate statements to the Defendant and his family that he would be eligible for parole after serving ten years violated Defendant's constitutional right to competent and effective counsel. As a result of this ineffectiveness, Defendant entered his plea without a full understanding of the consequences, in violation of his constitutional rights.

Trial counsel's derelictions were not reasonably designed to advance Defendant's interests. In fact, counsel's deficient performance caused Defendant to enter his plea unknowingly and involuntarily. See *Commonwealth v. Persinger*, 532 Pa. 317, 324, 615 A.2d 1305, 1308 n. 6 (1992). As the purpose of the plea colloquy is to insure that a defendant enters his plea knowingly, intelligently, and voluntarily, it cannot be said that trial counsel advanced Defendant's interests when her deficient performance prevented this from occurring. For similar reasons, Defendant was prejudiced by counsel's ineffective assistance, as counsel's deficient performance led him to enter the plea unknowingly and involuntarily, thereby depriving him of his constitutional right to a jury trial. Counsel's ineffectiveness further prejudiced Defendant in that he has spent the past 14 years in prison as a result of a conviction that resulted from a defective and unlawfully induced guilty plea that was negotiated by trial counsel.

Thereafter, trial counsel was ineffective for failing to file a motion to withdraw the guilty plea when she knew or should have known that there was a factual and/or legal basis for the withdrawal of the plea. Defendant did not seek to withdraw his guilty plea based on the issues raised herein until now because trial counsel led him to believe that there was no basis for such action and because previous appellate counsel were ineffective. Furthermore,:

> [t]he Commonwealth's position is, in essence, that appellant should have recognized, without assistance of counsel, the defect in the guilty plea colloquy and his counsel's ineffectiveness. The law does not expect so much of appellant, a layman.

Commonwealth v. Allen, 278 Pa.Super. 501, 508, 420 A.2d 653, 656 (1980). In *Commonwealth v. Wilks*, 250 Pa.Super. 182, 191, 378 A.2d 887, 891 (1977), the Court held that "to require a criminal defendant to recognize the ineptitude of his lawyer would be unreasonable."

In *Persinger,* the Pennsylvania Supreme Court held that defense counsel was ineffective for failing to file a motion to withdraw pleas of guilty when the defendant was never advised of the possibility of consecutive sentences. In that case the Supreme Court reasoned that the defendant's claim was of arguable merit because the defect in the plea colloquy rendered the plea unknowing and involuntary, rising to the level of a manifest injustice for the reasons previously discussed. Therefore, a basis existed for the withdrawal of the plea. Having found that the defendant's claim was of arguable merit, the Supreme Court concluded that he was prejudiced by counsel's failure to file a motion to withdraw the plea. *Commonwealth v. Persinger*, 532 Pa. 317, 615 A.2d 1305 (1992). The Supreme Court then concluded, without the benefit of an evidentiary hearing, that there could have been no reasonable basis designed to advance the defendant's interests for counsel's failure to file a meritorious motion on the defendant's behalf. Similarly, in the instant case, the failure to file a motion to withdraw the plea was not designed to advance Defendant's interests and therefore prejudiced him.

In the instant case, neither counsel nor the trial court explained to Defendant, nor did either seek to ascertain if he understood, that a consequence of his guilty plea could or would be a *mandatory minimum* sentence of life imprisonment without the possibility of parole. Moreover, counsel failed to object to the court's defective colloquy which

denied Defendant due process of law. Furthermore, counsel failed to raise this meritorious issue on appeal.

There could be no reason for counsel's failure to inform Defendant that a special circumstance of his plea would preclude his release from incarceration for the remainder of his life. Moreover, guilty plea counsel's gross *misinformation* to Defendant and his family, that he would be eligible for parole sometime after serving ten years, deprived Defendant of his constitutional right to effective assistance of counsel.

Here, as in the *Persinger* case, failure of the court to abide by Standard 14-1.4, 2nd Edition, ABA Standards For Criminal Justice, resulted in Defendant "suffering manifest injustice." Because such manifest injustice provided "adequate grounds for withdrawal of [Petitioner's] plea, counsel's failure to seek withdrawal of [such] plea was prejudicial to [Petitioner] . . . There was no reasonable basis for counsel's failure to explain the consequences of the plea and, therefore, counsel was ineffective." *Commonwealth v. Persinger*, 532 Pa. at 323-24.

As set out previously, a PCHA petition and subsequent appeal to the Superior court were filed by Attorney Rudenstein. In that appeal, counsel challenged only the defects in the colloquy pertaining to Defendant's lack of understanding of the consequences of the plea. Even with that counsel was ineffective for this reason: Defendant asked Attorney Rudenstein, prior to the conclusion of the PCHA evidentiary hearing, to call trial counsel Dunworth to the stand and ask her why she misinformed Defendant and his family that he would be eligible for parole sometime after serving ten years and why she failed to tell him that he would never be eligible for parole, but counsel

failed to call her and establish for the record her ineffectiveness. As a result, the issues raised in the instant appeal were never presented to the court for review. Pace himself did not knowingly and intelligently fail to raise these issues in any prior proceedings. Moreover, he has demonstrated the existence of extraordinary circumstances to justify his failure to raise these issues before now. Defendant Pace never gave Attorney Rudenstein permission to waive these issues, nor did Attorney Rudenstein inform him that if this and other issues were not raised in that PCHA petition, these issues would be waived. Because the issues raised in this motion have merit, Attorney Rudenstein was constitutionally ineffective for failing to pursue these issues on appeal and for failing to raise Attorney Dunworth's ineffectiveness for failing to raise these issues.

In conclusion, Attorney Rudenstein was constitutionally ineffective for failing to raise prior counsel's ineffectiveness for failing to raise the issues herein, and for failing himself to raise the issues raised herein.

IV. THE ISSUES RAISED HEREIN WOULD ENTITLE PACE TO FEDERAL HABEAS CORPUS RELIEF.

If this Court should find that the issues raised herein do not implicate the truth determining process, Defendant would still be entitled to post conviction collateral relief under 42 Pa.C.S.A. Section 9543(a)(2)(v). This section provides for PCRA relief when a conviction has resulted from "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a state prisoner."

In the present case, Defendant was deprived of his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when he entered his guilty plea unknowingly, unintelligently, and involuntarily because of the defects in the colloquy, because of the illegal sentence of life imprisonment without a stated minimum sentence for parole eligibility, and because of the deficient performance of his trial and appellant counsel. Because this claim implicates Pace's rights secured by the United States Constitution, he would be entitled to federal habeas corpus relief if there is no state procedural bar to such relief.

As discussed previously, there is a potential waiver of the issues raised herein because they were not raised previously by trial or appellant counsel. However, the federal courts will excuse a state procedural default based upon a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). Here the ineffective assistance of Defendant's prior attorneys constitutes cause to excuse the procedural default because Defendant had a constitutional right to counsel at the stages in the proceeding where counsel's ineffectiveness resulted in alleged waiver. *Commonwealth v. Eaddy*, 419 Pa. Super. 48, 56; 614 A.2d at 1203. Defendant was prejudiced by this ineffective assistance for the reasons previously discussed. A convicted person has a right to an appeal and has the right to effective representation of counsel for purposes of the appeal. There is no effective representation when counsel through inadvertence or otherwise fails to raise an arguably meritorious issue on appeal. *Commonwealth v. Pfaff*, 477 Pa. 461, 384 A.2d 1179 (1978).

> This crucial right to direct review of all criminal convictions, guaranteed under the Pennsylvania constitution, should not be lost due to the incompetent advice of prior counsel that no meritorious issues exist.

Eaddy, supra, 614 A.2d 1208.

When the failure to preserve an issue on direct appeal is the product of ineffective assistance of counsel, such failure does not result in a waiver of the issue for the purposes of post conviction collateral relief. *Commonwealth v. McNeil*, 497 Pa. 187, 439 A.2d 664 (1982); *Commonwealth v. Felder*, 246 Pa.Super. 324, 370 A.2d 1214 (1976). In *Commonwealth v. Bable*, 248 Pa.Super. 496, 375 A.2d 350 (1977), the Superior Court concluded that counsel's ineffective assistance in failing to challenge the validity of a plea on direct appeal, when there was a legal basis for such a challenge, constituted an extraordinary circumstance entitling the defendant to withdraw his plea pursuant to the PCHA proceeding. Moreover, when each of a PCRA petitioner's previous attorney is alleged to have rendered ineffective assistance of counsel, which if alleged would have preserved the issue for review, the issue of ineffective assistance of counsel is itself properly preserved for review. *Commonwealth v Bradley*, 332 Pa. Super 99, 480 A.2d 1205 (1984); *Commonwealth v. Nelson*, 393 Pa. Super. 611, 574 A.2d 1107, 1109 (1990); *Commonwealth v. Perlman*, 392 Pa.Super. 1, 572 A.2d 2 (1990).

Defendant's claims, then, are cognizable under the PCRA even if they do not implicate the truth determining process. *Id.*, 614 A.2d at 1208.

V. CONCLUSION

On the basis of the record, motion, and exhibits, Defendant respectfully prays that this Court order a withdrawal of his guilty plea and a new trial.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I personally caused to be served upon the following a true and correct copy of the foregoing Memorandum of Law in Support of Defendant's Motion under Post Conviction Relief Act by First Class Mail, postage prepaid on November 24, 1996:

Lynne Abraham, Esquire
District Attorney of Philadelphia
Appeal Unit 1421
1421 Arch Street
Philadelphia, PA 19102

ATTENTION: DEPUTY CHIEF

/s/ John A. Pace
John Allen Pace, Pro se
1100 Pike Street, AY6445
Huntingdon, PA 16654-1112

COURT OF COMMON PLEAS
JUDGE'S CHAMBERS

JOSEPH I. PAPALINI
JUDGE

RM. 206, C.J.C.
PHILADELPHIA, PA. 1910
DATE 01/17/97

TO- MR. ALFRED R. CARLONE
CRIMINAL LISTINGS
ROOM 206, C.J.C.

RE-COMMONWEALTH VS. JOHN A PACE — CP 8510-1272 1/1

AFTER REVIEWING THE RECORD IN THE ABOVE CAPTIONED MATTER, I AM DIRECTING THAT YOU APPOINT COUNSEL TO REPRESENT THIS PETITIONER IN HIS PCRA PETITION NOW BEFORE THIS COURT.

PLEASE NOTIFY COUNSEL THAT A CONFERENCE DATE HAS BEEN SET FOR 2/19/97, IN ROOM 206, C.J.C.

VERY TRULY YOURS,

DAVID N SAVITT
JUDGE

2/ QUARTER SESSIONS-FILE COPY

DAVID BELMONT
ATTORNEY-AT-LAW
1700 WALNUT STREET, SUITE 310
PHILADELPHIA, PA 19103

[LOGO]

(215) 545-3967

JUNE 13, 1997

Honorable David N. Savitt
Suite 1417
Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 10107

RE: COMMONWEALTH V. JOHN PACE
C.P. #8510-1272-1/1
FINLEY LETTER

Dear Judge Savitt:

I was appointed to represent John Pace on February 21, 1997. This letter is written after having reviewed the Quarter Sessions file, read the Notes of Testimony of the hearing, Common Pleas Court Opinion, the First P.C.R.A. Petition, P.C.R.A. correspondence from Petitioner, and Researched the Law on all issues raised by the defendant, Including but not limited to the following assertions by the Petitioner for P.C.R.A. relief:

1. Whether petitioner was misled into entering his guilty plea.

2. Whether trial counsel was ineffective for failing to properly advise him of the consequences of his guilty plea. Whether PCRA counsel (David Rubinstein) was ineffective in failing to subpoena trial counsel to testify at the evidentiary hearing.

My exhaustive review of the case has lead me to the conclusion that there are no issues of arguable merit and that there is not basis upon which relief can be granted under the Post Conviction Relief Act, 42 P.S. Section 9541, et. seq. I write now, in keeping with the holding of *Common v. Turner*, Pa. 544 A. 2d 927 (1988); *Commonwealth v. McClendon*, 495 Pa. 467, 434 A. 2d 1185 (1981); *Pennsylvania v. Finley*, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) and, *Commonwealth v. Finley*, 330 Pa. 313 479 A. 2d 568 (1984), to set forth the possible issues to be raised in a PCHA proceeding and the reasons where there are no issues of arguable merit.

On September 18, 1985 the petitioner was arrested for the beating of Randolph Baldwin. Mr. Randolph Baldwin died on September 28, 1985 and the petitioner was charged with murder and possession instrument of crime.

A lengthy colloquy of the defendant was conducted by the trial court (N.T. 2/13/86, pgs. 27-46). On December 13, 1986, the defendant was sentenced to the State Correctional Institution for a period of life imprisonment on the second degree murder charge (1275), also no more than one year nor more than two years to run concurrent on the possession instruments of crime (1272). No motion to reconsider the guilty plea was filed and petitioner did not take a direct appeal. Six months after his guilty plea and sentencing, petitioner filed a *pro se* petition for relief under the P.C.H.A. on August 21, 1986.

Petitioner filed a pro se Motion for Leave of Court to have defense counsel replaced by new counsel on February 23, 1987.

New counsel Franklin Green was appointed and he filed an Amended Petition on March 31, 1987. Commonwealth filed a Motion to Dismiss on June 3, 1987. Franklin Green filed an Answer to Commonwealth's Motion to Dismiss. On July 25, 1988 by Order of the Court, Commonwealth's Motion to Dismiss the Defendant's P.C.R.A. was denied and an evidentiary hearing was conducted on November 15, 1988.

Franklin Green, Esquire was permitted to withdraw as counsel on June 16, 1989. David Rubinstein, Esquire was appointed on July 28, 1989, to represent the petitioner on his second Post Conviction Relief Act Petition. David Rubinstein, Esquire filed an Amended Petition on October 27, 1989. On March 29, 1990, Commonwealth filed a Motion to Dismiss the defendant's P.C.R.A. Petition.

An evidentiary hearing was held on March 26, 1991, at which petitioner testified. On July 23, 1991, the lower court granted the Commonwealth's Motion to Dismiss.

On November 25, 1991, David Rubinstein filed a brief with the Superior Court of Pennsylvania. On March 30, 1992 the Superior Court of Pennsylvania affirmed the judgment of the lower court.

On July 2, 1992 petitioner filed a Petition for Allowance of Appeal Nunc Pro Tunc. On September 2, 1992 the Petition was denied by the Supreme Court of Pennsylvania.

On March 24, 1997, David Belmont, Esquire was appointed to represent the petitioner on another Post Conviction Relief Act Petition. This PCRA petition raises almost identical issues that was raised in the two prior PCRA petitions. The petitioner informs me that Mr.

Rubinstein was also ineffective for failing to subpoena trial counsel to testify at the evidentiary hearing.

I. Whether petitioner was misled into entering his guilty plea.

The record fails to support the allegations that petitioner did not knowingly and intelligently enter the guilty plea or that in some manner petitioner believes the court knew he didn't have the guilty interest to have been able to commit the crime of murder.

At the outset counsel for petitioner must point out that prior to the entry of all guilty pleas, the defendant must be advised of the nature and consequences of a guilty plea. Here, petitioner responded to each of the questions posed by the Court and he appeared to understand everything which was being explained to him. There is no allegation that the colloquy conducted was not in conformity with the mandate set forth by the Pennsylvania Supreme Court in the case of *Commonwealth vs. Ingram*, 455 Pa. 198 (1974). See also, *Commonwealth vs. Campbell*, 451 Pa. 465, 304 A.2d 121 (1973); *Commonwealth vs. Jackson*, 450 Pa. 417, 299 A.2d 209 (1973); *Pa. Rules of Criminal Procedure 319.*

In the case of *Commonwealth vs. Brown*, 363 A.2d 1249, 1253 (1976), the Pennsylvania Supreme Court stated:

> "A criminal defendant who elects to plead guilty has a duty to answer questions truthfully. We can not permit a defendant to postpone the final disposition of his case by lying to the Court and later alleging that his lies were induced by the prompting of counsel."

See also *Commonwealth vs. Cappelli*, 489 A.2d 813 (1985). In this case the petitioner/defendant entered his guilty plea knowingly and voluntarily. Nothing in his testimony shows that he was induced to enter his plea by promises made by counsel (N.T. 2/13/86, pgs. 27-46).

It is well settled that counsel can not be deemed ineffective if it was in the defendant's best interest to enter a guilty plea. *Commonwealth vs. Burno*, 456 A.2d 1080 (1983); *Commonwealth vs. Newell*, 406 A.2d 733 (1979).

There is presumption that counsel's representation was competent. *Commonwealth vs. Miller*, 431 A.2d 233 (1981). A defendant who asserts to the contrary in a Post Conviction Hearing Act proceeding has the burden of proving such an assertion. *Commonwealth vs. Dunbar*, 470 A.2d 74 (1983).

II. Whether trial counsel was ineffective for failing to properly advise petitioner of the consequences of his guilty plea. Whether PCRA counsel (David Rubinstein) was ineffective in failing to subpoena trial counsel to testify at the evidentiary hearing.

The test to determine whether counsel was effective is set out in *Commonwealth ex rel Washington vs. Marone*, 427 Pa. 604 (1967) at page 604:

> ". . . our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest."

In *Commonwealth vs. Pierce*, 527 A.2d 1973 (1987), the Supreme Court required to consider the standard for

analyzing ineffectiveness of counsel claims and to compare *Commonwealth ex rel Washington*, Supra with *Strickland vs. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984). The court in its analysis in *Pierce*, Supra at p. 976:

> "In determining whether counsel performance had any reasonable basis, Appellant points to *Commonwealth vs. Badger*, 482 Pa. 240, 393, A.2d 642 (1978), where we cautioned a reviewing court that: in examining the alternatives a court may not realize a harmless error analysis, and the alternatives must be examined only as a means of determining whether the course chosen had some reasonable basis." id. at 233, 393 A.2d at 644.

There is nothing in the Pretrial record or guilty plea Transcripts to infer that counsel was ineffective. Conversely, counsel vehemently represented the petitioner but he claims counsel was ineffective.

There is likewise nothing in the PCRA record or in the action taken by Mr. Rubinstein in his appeal to the Superior Court of Pennsylvania to support petitioner's contention of ineffective assistance.

Petitioner's claim lacks arguable merit because I am unable to conclude any ineffective assistance of counsel, or am I able to find that petitioner didn't knowingly and intelligently enter a guilty plea.

It is clear that John Pace had a full and fair opportunity with legal counsel to argue, any legal issues which existed in his case. He arrives at the Post Conviction Relief Act stage of his legal journey having fully and completely had an opportunity to litigate all issues, real and imagined, in his case before the Pennsylvania Courts

(Common Pleas Court, Superior Court, and Petition to the Supreme Court).

In conclusion, no issues of arguable merit exist in this case. All the issues raised by John Pace either have been finally litigated or are patently frivolous. I therefore respectfully submit that John Pace's Post Conviction Relief Act Petition be dismissed. I also request that I be allowed to withdraw as counsel for petitioner.

Respectfully Submitted,

/s/ David Belmont
DAVID BELMONT, ESQUIRE
ATTORNEY FOR JOHN PACE

[LOGO]

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

DAVID N. SAVITT
JUDGE

1417 CRIMINAL
JUSTICE CENTER
1301 FILBERT STREET
PHILADELPHIA, PA 19107
(215) 683-7148/49

June 17, 1997

Mr. John Pace, #AY-6445
SCI at Huntingdon
Drawer R
Huntingdon, PA 16652

RE: COMMONWEALTH v. JOHN PACE – PCRA
CP8510-1272,1/1

Dear Mr. Pace:

The court, after review of the Finley letter filed by your lawyer and the trial record has determined that the issues raised in your *pro se* Post Conviction Relief Act Petition are without merit. Accordingly, your petition will be dismissed at the next listing on Wednesday, July 23, 1997.

You have ten (10) days to respond to this notice.

Yours truly,
/s/ Saundra L. Dillio
Saundra L. Dillio
Law Clerk to Judge Savitt

DNS:mmh

Enclosure:

cc: David Belmont, Esquire
Robin Godfrey, Esquire, ADA
Kathleen Teti, Supervisor, PCRA Unit

John A. Pace
1100 Pike Street, AY-6445
Huntingdon, PA 16654

June 23, 1997

Honorable David N. Savitt
Suite 1417
Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 10107

RE: COMM.V. JOHN A. PACE C.P. #8510-1272-1275
Objections to Belmont's FINLEY LETTER

Dear Judge Savitt:

I object to the contentions that attorney David Belmont expressed in his letter that I received June 20, 1997 indicating that he have filed a *Finley Letter* with you to have my P.C.R.A. petition dismiss as frivolous, and to allow him to withdraw from my case.

I have not had the opportunity to have a meaningful discuss with Mr. Belmont about my case, because I was advised by him to communicate with him through correspondance because he's never in his office. I wrote Mr. Belmont twice indicating what issues I wanted him to raise, and that if he have any questions to please contact me. But I never received a response from him concerning the issues. Now subsequently, I receive a letter indicating that a *Finley Letter* has been filed, and I have 10 days to respond to this Honorable court.

I am no longer at SCI-Camphill prison, and have not been an over six years. I advised Mr. Belmont of this in one of my previous correspondence with him. The fact that he mailed this letter to Camphill prison and not to Huntingdon has caused me to receive his letter late. [See photo

copy of letter front.] Also, I don't know if it is appropriate for me to respond to Mr. Belmont's letter without notification from this court. So I am somewhat in limbo about my correct course of action, if any is needed.

However, if this court has takes an independent view of this matter, and than decided that I should response to the contents of Mr. Belmont's Finley Letter. I would kindly request this court to *grant me 30 days* before I have to response, because the delay in receiving his letter and getting access to the law library makes it almost impossible for me to immediately respond. Also, because the Department of Corrections is transferring inmates from this institution to reduce the population. I am expecting to be transferred soon. So *30 days* would suffice for me to properly respond if your honor informs me that there is a need to do so. I would be very grateful to you for your understanding and direction in this matter.

I thank you for your time . . . And hope to hear from you soon.

Respectfully yours,

John A. Pace, #AY-6445
1100 Pike Street (SCIH)
Huntingdon, PA 16654-1112

JP
xc: Kathleen Teti, PCRA Unit Office of the
District Attorney David Belmont File

DAVID BELMONT, ESQUIRE
1700 WALNUT STREET
SUITE 310
PHILADELPHIA, PA 19103

Fold at line over top of envelope to the right of the return address

CERTIFIED

P 326 488 223

MAIL

UNITED STATES POSTAL SERVICE

0000

U.S. POSTAGE
PAID
PHILADELPHIA,PA
19107
JUN 13, '97
AMOUNT

$3.00
00042992-10

239a

RETURN RECEIPT
REQUESTED

Mr. John Pace
AY-6445

FORWARD TO:
SCI, HUNTINGDON
PIKE STREET, DRAWER R
HUNTINGDON, PA 16652

248
Hunt

BEST AVAILABLE COPY

COMMONWEALTH VS.	SUPPLEMENT TO: INDICTMENT NO.
NAME, A/K/A, ADDRESS, ZIP CODE John Pace 648663	YEAR, TERM & NO. 8510-
STATUS OF DEFENDANT	THIS CASE INVOLVES NOS. 1272 TO 1275
PROCEEDING	

DATE	TYPE	COURTROOM
7-23-97	PCRA	607

COURT CLERK
[Illegible]

COURT STENO.
Jodi Pitta

ADA
Jan Folena

DEF. COUNSEL
David Belmont

DOCKET IN CHRONOLOGICAL ORDER
(List Charge No. and follow with sentence – signed & dated by Judge)

Hon. David N. Savitt 7-23-97 Rm 607
Defendants objections – Dismissed
PCRA Petition – Dismissed
By the Court Savitt J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NOVEMBER TERM, 1985
	:	NO. 1272, 1/1
v.	:	SUPERIOR COURT NO.
JOHN PACE	:	

OPINION

SAVITT, J. JULY 29, 1997

PROCEDURAL HISTORY

Petitioner John Pace pled guilty to second degree murder and possession of an instrument of a crime for the beating death and robbery of Randolph Baldwin on September 18, 1985. A thorough and complete guilty plea colloquy was conducted by this court on February 13, 1986. Neither a motion to withdraw the guilty plea nor a direct appeal was ever filed.

On August 21, 1986 petitioner filed a *pro se* PCRA petition, counsel was appointed and filed an amended petition on March 31, 1987. On July 25, 1988 the Commonwealth's Motion to Dismiss, which had been filed on June 3, 1987, was denied and a evidentiary hearing was held on November 15, 1988. On June 16, 1989 counsel was permitted to withdraw and new counsel was appointed and filed a supplemental amended petition. Another evidentiary hearing was held on March 26, 1991 and on July 23,1991 the court granted the Commonwealth's second motion to dismiss, which had been filed on March 29, 1990. On March 30,1992 Superior Court affirmed the

lower court and petitioner filed a petition for allowance of appeal which was denied by the Pennsylvania Supreme Court on September 2,1992.

The second and instant petition was filed on March 24,1997, counsel was appointed and filed a Finley letter on June 17, 1997. Petitioner was timely notified and, on July 23,1997, the petition was dismissed. This appeal followed. The sole issue raised by petitioner here, that his guilty plea was not knowing and voluntary, was raised in petitioner's first PCRA petition. A petitioner is not entitled to PCRA review on an issue which has been previously litigated. An issue has been previously litigated if the highest appellate court in which petitioner could have review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S.A. §9544(a)(2) or has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa.C.S.A. §9544(a)(3). Here the identical issue was not only raised and decided in a collateral proceeding but also reviewed by the Superior Court and decided against petitioner. Clearly, he is not entitled to a new trial on this basis.

Further, a review of the record of both the guilty plea colloquy and the collateral proceeding reveals that there are no issues of arguable merit. Petitioner's guilty plea colloquy was thorough and complete, petitioner answered every question indicating that he understood and there is no showing on the record of the previous collateral proceedings that petitioner was misled by trial counsel. Accordingly, petitioner is not entitled to relief on this basis.

For the reasons set forth herein the instant PCRA petition was denied.

/s/ Savitt
J.

BY CERTIFIED MAIL

TO: PETITIONER
FROM: THE HONORABLE David N. Savitt
RE: COMMONWEALTH V. John Pace
C.P. 8510-1272
P.C.R.A.

DATE: July 25, 1997

On July 23, 1997, your attorney submitted a *Finley* letter to the Court, explaining that there were no issues of arguable merit in your PCRA petition. Based on my review of the letter and the file, I dismissed your petition. You have thirty (30) days from the date of the order to file a notice of appeal to the Superior Court of Pennsylvania. The notice must be in writing and must be filed in Room 206 Criminal Justice Center, 1301 Filbert St., Philadelphia, PA 19107. Because your case was dismissed after your attorney submitted a *Finley* letter, you are no longer entitled to an attorney free of charge. You can file the notice of appeal on your own or you can hire an attorney.

cc: Defense Counsel, David Belmont Esq.
Christopher Diviny, Chief, Motions Unit,
District Attorney's Office

DEFENDANT MUST FILE AN ORIGINAL AND
ONE COPY OF:
Notice of Appeal
Proof of Service
Verified Statement

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRIST

COMMONWEALTH OF PENNSYLVANIA,
Appelle

vs.

JOHN A. PACE,
Appellant

Philadelphia 1997
No. 03642

APPELLANT'S BRIEF

(Filed Apr. 8, 1998)

Appeal from the ORDER of the Honorable David N. Savitt filed July 23, 1997, in the Court of Common Pleas, Criminal Trial Divion, which denied appellant's Post Conviction Relief Petition.

John A. Pace, AY 6445
P.O. Box 244
Graterford, Pennsylvania 19426

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to title *42 Pa. C.S.A. §742;* and *Pa.R.A.P 341 (a).*

ORDER IN QUESTION

The Order of Judgment of The Honorable David N. Savitt, filed July 23, 1997, in the Court of Common Pleas which accepted attorney David Belmont's Turner/Finley no-merit letter and request to withdraw as appellant's attorney. And his dismissal of appellant's Post Conviction Collateral petition asking for relief on CP# No. 8510-1272.

QUESTIONS PRESENTED

Did the Post-Conviction Court err when it granted attorney David Belmont's Turner/Finley no-merit letter to withdraw, thus dismissing the petitioner's petition under the Post-Conviction Collateral Relief Act, in which he avers the following:

1. Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

2. Guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea.

3. Ineffective assistance of counsel at all levels of representation resulted in denial of due process and a miscarriage of justice.

ANSWER BELOW: NOT ANSWERED

STATEMENT OF THE CASE

PROCEDURAL HISTORY:

The petitioner, who was seventeen at the time, having previously been charged with murder and related offenses, was assigned to The Honorable David Savitt for trial on February 13, 1986. At that time, the petitioner entered a plea to murder in the second degree and thereafter, and on the same date, was sentenced to mandatory life in prison. At trial, the defendant was represented by counsel Moira Dunworth and after trial, no direct appeal was taken. On or about August 21, 1986, the petitioner filed a petition under the Post-Conviction Hearing Act and thereafter, Franklin D. Green, Esquire, was appointed to represent petitioner. An Amended Petition was filed on March 31, 1987 alleging trial counsel's ineffectiveness. Thereafter, a motion to Dismiss hearing was held in Room 788 city Hall on January 11, 1988, before The Honorable Joseph D. O'Keefe. On July 25, 1988, an evidentiary hearing was granted and scheduled for November 15, 1988. Thereafter, Mr. Green withdrew, apparently for personal reasons, and then attorney David S. Rudenstein was appointed. Attorney Rudenstein then filed his own Amended P.C.R.A. Petition, which after a hearing before The Honorable James D. McCrudden was Ordered dismissed without any further hearings on July 23, 1991. An appeal was filed October 10, 1991 by attorney David S. Rudenstein, alleging trial counsel's ineffectiveness and The Honorable James McCrudden err by dismissing petitioner's P.C.H.A. Petition.

On March 30, 1992, the Superior Court affirmed the lower courts decision. May 27, 1992, petitioner filed pro se a "Petition for *Permission* to file Petition for Allowance of

Appeal Nunc Pro Tunc." September 3, 1992, the Supreme Ordered this petition denied. Petitioner then filed a P.C.R.A. petition November 27, 1996, his second Post Conviction Collateral Relief Petition. Thereafter, attorney David Belmont was appointed to represent petitioner on his P.C.R.A. Petition. On June 17, 1997, petitioner was notified by counsel David Belmont that he had filed a Turner/Finley no-merit letter and asked for permission to withdraw from representing petitioner's P.C.R.A. petition. On June 17, 1997, petitioner received letter from The Honorable David Savitt, indicating that his petition would be dismissed, but that petitioner have ten (10) days to respond to the notice. On July 7, 1997, petitioner filed a motion objecting to attorney David Belmont's Finley Letter and the court's intent to dismiss. July 23, 1997 petitioner's P.C.R.A petition was Ordered dismissed by The Honorable David S. Savitt

SUMMARY OF THE ARGUMENTS

The Post Conviction Court erred when it granted PCRA counsel David Belmont's Finley no-merit letter and request to withdraw, and an its dismissal of petitioner's PCRA petition. In accordance with *Ander v. California* and *Commonwealth v. Finley,* counsel Belmont failed to set forth in his *Finley Brief* all of the issues raised by petitioner and the reasons they are not of arguable merit. Judge Savitt failed to thoroughly evaluate petitioner's issues, counsel's finley brief, and require counsel Belmont to address all of petitioner's issues averring the following:

Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

Trial Judge sentence the petitioner to a term of life imprisonment without a discretionary minimum for parole eligibility, which violates his right to a minimum term and parole eligibility, as established by 42 Pa.C.S., § 9756(c).

Guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea. Trial Judge failed to inform the petitioner that by pleading guilty to second-degree murder, that he would receive a mandatory minimum sentence of life *without parole*, a violation of the requirements of Pa.R.Crim.P. 319 and the due process provisions of the Constitutions of the United States and Pennsylvania. Moreover, trial counsel misinformed the petitioner of the consequences of his plea by telling him that he would he paroled after serving 10 to 15 years.

Ineffective assistance of counsel at all levels of representation resulted in denial of due process and a miscarriage of justice. Trial counsel was ineffective and did not act in petitioner's best interest by inducing him to plead guilty to second-degree murder and failing to inform the trial court that it erred by accepting the petitioner's guilty plea without informing or ensuring that he understand that he would receive a mandatory minimum sentence of *life without parole.* As well, trial counsel failed to take an immediate appeal to have the petitioner's guilty plea withdrew when she knew of the court's err. PCRA counsel David Rudenstein was ineffective in failing to subpoena trial counsel at the evidentiary hearing held March 26, 1991 to testify about her ineffectiveness, when she admitted to him previously, via the telephone, that she didn't explain to the petitioner that he would be receiving a mandatory minimum sentence of life without parole. Thus,

creating a miscarriage of justice that no civilized society can tolerate.

ARGUMENT

POINT I

TERMS OF LIFE IMPRISONMENT IMPOSED WITHOUT A DISCRETIONARY MINIMUM TERM FOR PAROLE ELIGIBILITY FOR CRIMES EXCEPT FIRST AND SECOND DEGREE ARSON-MURDER ARE ILLEGAL.

The petitioner's appellate argument is straight forward and simple, to wit, that the PCRA Judge David N. Savitt erred when it granted PCRA counsel David Belmont's finley no-merit letter and when he dismissed the petitioner's Post Conviction Collateral Relief petition. The petitioner challenges the legality of his life imprisonment sentence without a discretionary minimum term for parole eligibility, which is an illegal sentence. This issue has never been raised before by the petitioner, nor is it considered waived, because it is essentially an attack on the legality of the sentence, which is illegal, and would entitle to the petitioner to an explicit minimum term that will engender parole eligibility.

In accordance with *Commonwealth v. Finley,* 330 Pa. 313 479 A. 2d 568 (1984), which have adopted the procedures established in *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel when requesting to withdraw his presentation of the Defendant, must do so with an accompanying brief listing each issue Defendant wished to have raised, followed by an explanation why those issues were meritless. In this instant case, petitioner challenges the legality of his life sentence

without a discretionary minimum term. This issue is raised in the *"Post Conviction Relief Act Petition"* pg 2-3 (10)(c), and *"Memorandum of Law"* pg 1-13. But not only do counsel Belmont fail to explain why this issue raised by petitioner is without merit, he makes no mention of this issue raised by the petitioner. Again, in accordance with *Commonwealth v. Finley,* supra, at 570, Judge Savitt should have concluded after his independent review or full examination of the record, that counsel Belmont's request to withdraw his representation should be dismissed. He should at best, required counsel to address petitioner's issue. So Judge David Savitt erred when he granted counsel David Belmont's request to withdraw, and thus dismissing the petitioner's Post Conviction Relief Act petition. The Petitioner's issue is as follow:

This issue is limited solely to sentence rather than conviction, this is a challenge to the legality and constitutionality of the mandatory sentence imposed and, therefore, could not have been waived. 42 Pa.C.S.A. § 9781(a); *Commonwealth v. Campbell,* 351 Pa.Super. 56, 505 A.2d 262 (1986). Where the court failed to inform the defendant of his right to file a motion challenging the propriety of a mandatory sentence of life imprisonment without parole, the issue of the constitutionality of a life sentence has not been waived because it is essentially an attack on the legality of the sentence. *Commonwealth v. Middleton,* 320 Pa.Super. 533, 543 n. 5; 467 A.2d 841 (1983); Pennsylvania Rules of Criminal Procedure, Rule 1405(c)(2).

The Honorable Judge Savitt sentenced Defendant Pace to a term of life imprisonment for second degree murder without an established minimum sentence for parole eligibility. Assuming, for the sake of this argument only, that the court properly sentenced the Defendant to a

life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by 42 Pa.C.S., § 9756(c). That section provides:

> (c) Prohibition of Parole. – Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because Pace was not convicted of first degree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under § 9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. 1 Pa.C.S. § 1924. ("Exceptions expressed in a statute shall be construed to exclude all others.") As held in *Commonwealth v. Bell,* 512 Pa. 334, 516 A.2d 1172, 1175 (1986), applying 1 Pa.C.S. § 1921(b), when statutory language is clear, the judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although § 9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which, on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole

any person serving life imprisonment. That statute, 61 Pa.Stat. Section 331. 21, provides that:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, 61 Pa.Stat. § 331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of Title 42 and 331. 21 of Purdon's Title 61, although codified in different titles of the Pennsylvania penal law, are statutes "*in pari materia*" because they "relate to the same persons or things or to the same class of persons or things." 1 Pa.C.S. § 1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are "*in pari materia*" with one another and with the relevant sections of Title 61, and should be read together, in a manner that, "if possible, [gives] effect to all [their] provisions." 1 Pa.C.S. § 1921(a).

At first reading 42 Pa.C.S. § 9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the Defendant have been convicted of second degree murder and face life sentences, to a non parole eligible sentence; the latter prohibits the parole

board from releasing prisoners serving life terms. Yet read and applied in relation to the pertinent portions of the Crimes Code and according to the Commonwealth's codified principles of statutory construction, the two statutes are, in fact, reconcilable.

There are two methods of reconciling the statutes to give both of them effect. The first is to recognize that in 1941, when the Title 61 provisions were enacted, Act of August 6, 1941, P.L. 861, the offense of murder of the first degree was the only offense for which a term of life imprisonment was provided. Section 9756(c) was not enacted until 1974. Act of Dec. 30, P.L. 1052, No. 345, transferred to Title 42 and recodified by Act of Oct. 5, 1980, P.L. 693, No. 142, § 401(a). Giving effect to the language of § 9756(c), it becomes clear the General Assembly did not intend to extend the reach of § 331.21 to cover life sentences imposed in other than first degree murder cases. Thus, the enactment of what is now § 9756(c) as part of the same 1974 criminal code reform that separated felony murder from willful and premeditated murder establishes parole eligibility in those cases.

The other method of reconciling Sections 9756(c) and 331.21 involves a careful examination of the life terms provided in the Crimes Code. The legislature has specified that the terms of life imprisonment provided for certain aggravated types of murder shall be without parole. For examples, 18 Pa.C.S. § 3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*" the same is provided for arson-related murder in the second degree. In contrast, in section 1102(b), under

which Pace was sentenced, no such prohibition appears, nor does it in 18 Pa.C.S. § 1102(a), which provides a term of life imprisonment for murder in the first degree. This demonstrates that the legislature was explicit about prohibiting parole where it intended to do so. *Cf.* 1 Pa.C.S. Section 1924 ("Exceptions expressed in a statute shall be construed to exclude all others.") It did not intend to bar for life terms imposed, *inter alia,* under Section 1102(b).

When this statutory scheme is construed with sections 9756(c) and 331.21, it becomes clear that where the latter section provides parole release for "convicts . . . serving life imprisonment," it must be read as referring to those offenses for which the legislature has specified terms of life imprisonment without right to parole. This reading that "[w]henever a general provision in a statute [the provision in section 331.21] shall be in conflict with a special provision in . . . another statute [the opposite prohibition in Section 9756(c)], the two shall be construed, if possible, so that effect may be given to both." 1 Pa.C.S. Section 1933.

Alternatively, Sections 9756(c) and 331.21 may be seen as irreconcilable. The principle of statutory construction that statute "*in pari materia*" should be construed together is not absolute; the statute says this shall be done "if possible." 1 Pa.C.S. Section 1932(b). If it is not possible to give effect to both of these statutes, then Section 331.21, as it pertains to persons serving life sentences for all offenses except first degree murder, must be seen as implicitly repealed, in pertinent part, by the later-enacted Section 9756(c). Under 1 Pa.C.S. Section 1936, "[w]henever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." See

also 1 Pa.C.S. section 1971 ("a later statute shall not be construed to supply [sic] or repeal an earlier statute unless the two statutes are irreconcilable." Section 9756(c) of Title 42 was enacted after Section 331.21 of Title 61, as discussed above. See also 1 Pa.C.S. section 1928(b)(1) (penal provisions shall be strictly construed); *Commonwealth v. Darush*, 256 Pa.Super. 344, 389 A.2d 1165, 1158 (1978) (strict construction is in favor of defendant); *Commonwealth v. Cluck*, 252 Pa.Super. 228, 381 A.2d 472, 477 (1977) (any ambiguity in penal statutes must be resolved in favor of life and liberty).

In *Castle v. Pennsylvania Board of Probation and Parole,* 123 Pa.Comw. 570, 554 A.2d 625 (1999), *all app. denied,* 567 A.2d 653 (1989), an action by a prisoner to compel the scheduling of a parole hearing, the other intermediate appellate court rejected the argument that section 9756(c) gave the defendant, there serving a life sentence for second-degree murder, a right to parole consideration and thereby impliedly repealed the contrary provisions in 61 Pa.Stat. Section 331.21. *Id.* at 628-29. The basis of its decision was the asserted lack of a stated purpose of Section 9756 to create parole eligibility, and the fact that the section only governs action by the trial court and not the parole board, whereas Section 331.21 prohibits the board from paroling prisoners serving life terms. *Id.* For these reasons, the court did not find the two statutes "clearly irreconcilable," a prerequisite for finding repeal by implication. *Id.* at 629.

This court should decline to follow *Castle* here for two reasons. First, the *Castle* court was incorrect in stating that Section 9756 did not have as its purpose the creation of parole eligibility. Subsection (c) of that section is entitled "Prohibition of Parole," and expressly concerns parole

eligibility. It lists specific instances in which the court may sentence without the right to parole, stating that these are the "only" such instances. In light of the codified principle of statutory construction that exceptions expressed in a statute exclude all others, 1 Pa.C.S Section 1924, it is clear that this subsection had as its purpose to and did create parole eligibility for all offenses not specified.

Second, because the General Assembly did intend Section 9756(c) to create parole eligibility, the *Castle* court was wrong in deciding that it was not irreconcilable with Section 331.21. Thus, we are left with the anomaly of one statute providing a right to parole, and another prohibiting the only body empowered to release on parole from doing so. It is presumed that the "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. Section 1922(1). The result of *Castle* is all three of these. In any event, this appeal *does* concern action of the sentencing court, which *is* expressly bound by Section 9756(b) and (c). Thus, at the least, this case may be readily distinguished on that basis.

All sentences imposed in Pennsylvania are for the maximum sentence. Maximum sentences are the "legal and valid" sentences imposed. *Commonwealth v. Daniels,* 430 Pa. 442, 243 A.2d 400 (1968). "The word 'sentence' when unmodified by the word 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence." *Commonwealth v. Glover,* 397 Pa. 543, 546-47, 156 A.2d 114 (1959). "The legislature has the right to fix the maximum penalty and likewise can, if it see fit, name the minimum." *Id.* at 5454. "When the legislature has desired to provide for a mandatory minimum in the past it has done so in unequivocal language." *Id.* at 547. The General Assembly has confirmed the

Glover Court's analysis by subsequently adopting the Mandatory Minimum Sentencing Act, 42 Pa.C.S.A. Sections 9712, 9713, 9714, in which specific sentences are deemed to be mandatory minimum sentences, none of which include sentences of life imprisonment. If minimum sentences 'are not implicated much less mandated by the sentencing statute, then the discretion of the trial court is necessarily the controlling factor.' *Commonwealth v. Button,* 332 Pa. Super. 239, 244; 481 A.2d 342 (1984).

The legislature clearly intended to distinguish punishment for first – degree murder and second – degree felony murder from other criminal offenses, a goal accomplished by

[Page Numbered 17 Missing From Original]

are not precluded from the benefit of 19 P.S. Section 1057:

> Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a state penitentiary ... the court ... shall pronounce upon such convict a sentence of imprisonment for an indefinite term stating in such sentence the minimum and maximum limits thereof ..."

Commonwealth v. Bulter, supra., at 291. The only parameters placed upon the minimum sentence to be imposed by the court is that "the minimum shall never exceed one-half of the maximum sentence." 19 P.S. Section 1057; 42 Pa.C.S.A. Section 9756(b). This implies that the only minimum sentence precluded by these statutes when the maximum sentence is life imprisonment is "life" itself, the very sentence presumed by the judiciary and administrative agencies.

Certainly a sentencing court may not sentence one convicted of second-degree felony murder to a lesser *maximum* sentence than life imprisonment. The *Castle* court erred by assuming that sentences of life imprisonment are other than simply maximum sentences. Given that two purposes of the Crimes Code, 18 Pa.C.S.A. Section 104(3)(5), effective June 6, 1973, are to "safeguard offenders against excessive, disproportionate, and arbitrary punishment" and "to differentiate among offenders with a view to just individualization in their treatment," and that components of the Crimes Code are to be construed in terms of these purposes, it is necessary to reconcile 18 P.S. Section 4701, 19 P.S. Section 1057, 18 Pa.C.S.A. 1102, 1321(e) and 2502, 42 Pa.C.S.A. Section 9711 and 9756, inasmuch as none preclude another. "While [parole] is an amelioration of punishment, *it is in legal effect imprisonment. Commonwealth ex rel. Banks v. Cain,* 345 Pa. 581, 589; 28 A.2d 897 (1942); *Anderson v. Corall,* 26 U.S. 193, 196; 44 S.CT. 43 (1923). If, under Pennsylvania law, a sentence to a five to ten year term of imprisonment is construed a ten-year sentence, *United States ex rel. McNeils v. Pa. Board of Parole.,* 141 F.Supp. 23 (1956), a sentence of one day to life imprisonment must be considered a sentence of life imprisonment and, therefore, in compliance with the foregoing statutes.

An overview of the foregoing statutes, either individually or *in pari materia,* raises reasonable constructions that favor life and liberty much more than past and current interpretations. First, the parole Act, adopted August 6, 1941, and amended to create the Pennsylvania Board of Probation and Parole December 27, 1965, has been explicitly repealed insofar as it is inconsistent with subsequent legislation, that is, with the phase 'or serving

life imprisonment,' as found at 61 P.S. Section 331.21. The most noteworthy statutory refinement regarding parole eligibility for sentences of life imprisonment is found in the clear and concise language of 42 Pa.C.S.A. Section 9756, effective March 30, 1975. In Section 9756(c), the General Assembly very succinctly defined these offenders to whom parole eligibility *must* be afforded and those to whom the right to parole *may* be provided. Even the most cursory perusal of Section 9756(c) dictates the conclusion that, except for four (4) specific categories of offenses, the court may impose a sentence with parole eligibility. Conspicuously absent from that group of four offenses are second-degree felony murder [18 Pa.C.S.A. Section 1102(b)], and a subsequent conviction for an unrelated homicide [42 Pa. C.S.A. Section 9715], all of which mandate a sentence of life imprisonment. "A change of language in subsequent statutes on the same matter indicates a change of legislative intent." *Haughey v. Dillon*, 379 Pa. 1, 6; 108 A.2d 69 (1954); *Commonwealth v. Garcia*, 474 Pa. 449, 477; 378 A.2d 1199 (1977). Therefore, if the court properly sentenced Defendant Pace to a life term, it violated 42 Pa.C.S. Section 9756(b) and (c) by failing to to set a minimum sentence, at the completion of which Defendant would be eligible to parole.

ARGUMENT

POINT II

GUILTY PLEA COLLOQUY THAT FAILED TO ENSURE PETITIONER UNDERSTOOD CONSEQUENCES OF PLEA COMPELS WITHDRAWAL OF PLEA.

Petitioner entered a plea of guilty in open court to the charges of second-degree murder and possession of an

instrument of crime. Petitioner subsequently received a life sentence without a stated minimum sentence for parole eligibility. Both the court and trial counsel failed to ascertain on the record whether Petitioner understood the nature and consequences of his guilty plea. Such a defective colloquy violated the requirements of Pa.R.Crim.P. 319 and the due process provision of the Constitutions of the United States and Pennsylvania, and compels withdrawal of Petitioner's Plea.

Moreover, trial counsel misinformed Petitioner and his family that he would be eligible for parole after serving 10 to 15 years in the state prison system. Prior to Petitioner entering his guilty plea, counsel Dunworth met with Petitioner's biological parents and brother to discuss the Petitioner's case and secure the family's support, since the Petitioner was still a juvenile. Attorney Dunworth informed Petitioner's family that it was her professional opinion that the Petitioner should plead guilty to second degree murder. Attorney Dunworth also informed the family that the Petitioner would have to serve 10 to 15 years before he would be eligible for parole. Based on their understanding of counsel's statements, the family advised the Petitioner to plead guilty to second degree murder. [See Affidavits at Exhibits A, B and C]. Petitioner, who was 17 at the time, would not have plead guilty had he known that he would have to spend the remainder of his life behind bars without becoming eligible for parole. As well, trial counsel admitted to the Petitioner's former court appointed PCRA counsel David Rudenstein of her failure to properly advise Petitioner and his family of the consequences of his plea to second-degree murder; simply because, "she had an emotional time dealing the Petitioner

and his family as a prospect of serving a life sentence." [See Exhibit D].

This issue has not beenlitigated before, nor should it be considered waived, because the Superior Court did not determine until 1992, in a case characterized as one of "first impression," that a sentence of life imprisonment is a *mandatory minimum* term, see *Commonwealth v Yount*, 615 A.2d 1316 19-21., thus precluding a challenge to this holding prior to 1992. Therefore, Judge Savitt erred when he permitted court appointed PCRA counsel David Belmont to withdraw his representation without amending Petitioner's PCRA petition, or requiring that counsel in his *Finley brief* show reasons why Petitioner's issue is without merit. Additionally, Judge Savitt failed to state in his opinion denying Petitioner's PCRA petition, reasons this particular issue is without merit. Judge Savitt fails to even make mention that the Petitioner raised this issue in his *Post Convict Relief Act petition*, supra. at pgs. 2-3 (10)(a) (11)(a) and *Memorandum of Law*, supra. at pgs. 13-21. Judge Savitt should have examined the record and than determine if the issue raised was wholly frivolous. *See*, *Commonwealth v. Finley*, supra, at 570.

Petitioner argument is that if the conclusion of the *castle* Court that terms of life imprisonment imposed are mandatory minimum sentences, then the Honorable Court erred by accepting Petitioner's guilty plea without informing him or insuring that he understood that a consequences of his plea would be a term of life imprisonment without parole. Petitioner did not know that a consequence of his plea would be to spend the remainder of his life behind bars without becoming eligible for parole. Had he known, he would not have pleaded guilty. Such a defective colloquy violated the requirements of

Pa.R.Crim.P. 319 and the due process provisions of the Constitutions of the United States and Pennsylvania, and compels withdrawal of Petitioner's plea.

The United States Supreme Court has consistently applied stringent standards for testing the validity of a guilty plea; that is, that it was made voluntarily after proper advice and with full understanding of the consequences of the plea. *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969).

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable of canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences.

Boykin v. Alabama, 385 U.S. 238, 244; 89 S.Ct. 1709, 1712 (1969).

Pa.R.Crim.P. 319, the goal of which is "assurance that a defendant's guilty plea is tendered-knowing, intelligently, voluntarily and understandingly," *Commonwealth v. Persinger,* 532 Pa. 317, 322, 615 A.2d 1305 (1992), is but a restatement of this constitutional principle as well as existing law and practice. As the Third Circuit has said:

> We therefore reach the same conclusion as did the Ninth Circuit in *Munich v. United States,* 337 F.2d 356 (1964): "[O]ne who, at the time of entering a plea of guilty, is not aware of the fact that he would not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea."

Berry v. United States, 312 F.2d 189, 193 (3rd Cir. 1969). Thus, failure to advise Petitioner of the Consequences of

his plea – ineligibility for parole – is equal to a denial of due process. "[P]rejudice inheres when an accused pleads guilty, thus convicting himself of a criminal offense, without understanding the significance or consequences of his action." *Id.* at 191.

The mandate of Pa.R.Crim.P. 319, as well as its federal counterpart, Fed.R.Crim.P.11, is designed to ensure that the pleader is apprised, at the very least, of the period of *required* incarceration. Loss of parole eligibility is "an inseparable ingredient of the punishment imposed." *Id.* at 192; *In re Grand Jury Investigation,* 542 F.2d 166, 173 (3rd Cir. 1976), *cert. denied,* 429 U.S. 1047 (1977). Failure to impart information regarding "the worst to expect," in term of imprisonment is a failure to explain the consequences of a plea. *Roberts v. United States,* 491 F.2d 1236, 1238 (3rd Cir. 1974). The worst conceivable term of imprisonment is life imprisonment without parole.

Ordinarily, it would not be necessary for a trial court to include an explanation of probation or parole in its inquiry into a defendant's understanding of his plea. However, circumstances surrounding a plea that mandates a sentences of life imprisonment without the possibility of parole in not ordinary. The particular status of such defendants bring into mechanical operation a legislative directive severely restricting the freedom of action of the sentencing judge as well as the parole authority. "Under such circumstances, the knowledge of ineligibility for parole is as necessary to an understanding of the plea as is the knowledge of the maximum sentence possible." *Berry v. United States,* 412 F.2d 189, 192-193 (3rd Cir. 1969).

This constitutional principle was applied to Pennsylvania law by the Third Circuit Court of Appeals in *United*

States ex rel. Crosby v. Brierley, 404 F.2d 790 (3rd Cir. 1968), *overruled by United States ex rel. Grays v. Rundle,* 428 F.2d 1401 (3rd Cir. 1970). The *crosby* Court stated that Pa.R.Crim.P 319 anticipates:

> . . . an inquiry of the defendant to form the factual basis that the plea is "competently and intelligently made". . . . Trial courts have a duty . . . to insure that the defendant understands the consequences of his plea. This is not so much the result of promulgations of federal and state rules of criminal procedure as it is a part of the basic concepts of proper judicial administration in Pennsylvania. . . .

Id. at 794. The rationale of *Berry,* that failure to advise a defendant, prior to acceptance of guilty plea, of ineligibility for parole denies due process, was adopted by the Pennsylvania Supreme Court in *Commonwealth v. Zuber,* 466 Pa. 453, 461; 353 A.2d 441, 445 (1976).

The mandatory nature of Rule 319 was clearly established in *Commonwealth v. Ingram,* 455 Pa. 198, 316 A.2d 77 (1977). Other cases indicate that six specific areas of inquiry must be explored, the most relevant being whether the defendant is aware of the permissible range of sentences for the offenses charged. *Commonwealth v. Willis,* 417 Pa. 50, 52, 369 A.2d 1189 (1977); *Commonwealth v. Fay,* 294 Pa. Super. 332, 337, 439 A.2d 1227 (1982). Lack of such inquiry or notice deprives the defendant of "the right to weigh the alternatives of going to trial versus entering a guilty plea . . . because of the real possibility . . . that he was misled or acted pursuant to inaccurate or incorrect information" [*Commonwealth v. Leonhart,* 358 Pa. Super. 494, 501, 517 A. 2d 1342 (1986)] and require that the defendant be allowed to withdraw his guilty plea.

Commonwealth v. Kulp, 476 Pa. 358, 382 A.2d 1209 (1978). Before accepting a plea of guilty, the court must insure that the defendant understands the meaning of words like "consecutive". *Commonwealth v. Guyton*, 331 Pa. Super. 231, 480 A.2d 330 (1984). No less important are words and phases like *life imprisonment* and *mandatory minimum sentences*. "[N]o plea be viewed as voluntary that is the product of ignorance." *Commonwealth ex rel. West v. Myers*, 423 Pa. 1, 5-6, 222 A. 2d 918 (1966).

The explicit purpose of the Crimes Code, "to give fair warning . . . of the sentences that may be imposed on conviction of an offense," is relevant. 18 Pa.C.S. § 104(4). Significantly, the ABA Standards For Criminal Justice, Second Edition at 14-1.4, provides the following:

> (a) the Court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:
>
> . . . . (ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the *mandatory minimum sentence*, if any, on the charge, or any special circumstances affecting probation or release from incarceration. (emphasis added)

Commonwealth v. Persinger, 532 Pa at 323-24, held that the reasoning behind the above Standard is sound because it insures that the defendant appreciates the significance and consequences of his plea. See also *Commonwealth v. Fay*, 294 Pa.Super. at 237. The *Persinger* Court went on to hold that failure of the trial court to abide by this standard results in the defendant suffering *manifest injustice*. Petitioner contends that such miscarriage of

justice mandates that neither "delay" nor "multiple petitions" bar PCRA or federal habeas corpus challenges to this denial of due process.

Analogous to 42 Pa.C.S. § 9718, Sections 4701, 1102, 2704, and 9715 contain no notice requirement prior to imposition of a mandatory minimum term of life imprisonment. However, "there can be no mistake that notice of intention to pursue a mandatory minimum sentence under § 9718 is necessary . . . before acceptance of guilty plea. Moreover, it is clear that such a requirement is born not of legislative enactment, but rather from judicial interpretation of due process guarantees whose purposes are to inform defendant of *all* of the consequences of entering a guilty plea before the act has become *fait accompli* . . . What is important is that Appellant was made aware of the consequences of his action *prior* to the acceptances of his plea." *Commonwealth v. Boyles*, 414 Pa.Super. 282, 293, 606 A.2d 1201.

A guilty plea may be attacked after sentencing on three grounds: legality of sentence, jurisdiction of the court, and the voluntary, knowing, and intelligent nature of the guilty plea itself. *Commonwealth v. Alston*, 387 Pa.Super. 393, 564 A.2d 235 (1989). In determining whether a guilty plea is voluntarily and understandingly entered, it is mandatory that the court ask questions to ascertain the defendant's awareness of the permissible range of sentences. *Commonwealth v. Persinger*, 532 Pa. at 321. The absence of this inquiry from the transcripts renders the colloquy defective which, in turn, provides adequate grounds for withdrawal of the plea. Counsel's failure to seek withdrawal of Petitioner's plea was, therefore, prejudicial to Petition. *Id.* at 234

In the instant case, the Honorable Court failed to advise Petitioner that a consequence of his plea would be a mandatory minimum term of life imprisonment. The Court only made reference to the maximum penalty:

> Q [THE COURT]: If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment. Do you understand that? A Yes.

TT: 43, Petitioner was unaware that the forfeiture of his right to a trial by jury would result in his removal from society, without eligibility for parole, for the remainder of his life. The Courts in *Commonwealth v. Carey*, 235 Pa.Superior Ct. 366, 371-72 340 A.2d 509-11 (1975) and *Commonwealth v. Byng*, 364 Pa. Superior Ct. 636 (1987) states that the voluntariness of a waiver may be vitiated by misrepresentation as to sentencing if the defendant is shown to have relied on the misrepresentation when making the decision to waive a jury trial.

That Petitioner was misinformed about the consequences of his plea is also evident by the comments guilty plea Attorney Dunworth made to Petitioner's PCRA/ Superior Court counsel, David S. Rudenstein:

> .... your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family.

[See Exhibit D, supra]. Attorney Dunworth's states to Attorney Rudenstein makes it clear that she did not inform Petitioner that he was pleading guilty to a life sentence without parole eligibility. Moreover, her statements to both the Petitioner and his family [See exhibits

A, B and C, supra.] that he would be eligible for parole sometime after serving ten to fifthteen years was completely misleading and inaccurate to Petitioner. In *Strader v. Garrison,* 611 F.2d 61, 65 (1979), the Forth Circuit held that, "[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel;" see *Sparks v. Sowders,* 852 F.882, 885 (6th Cir. 1988).

Whether the Court was aware or unaware that Petitioner Pace's understand was factually and legally incorrect may be irrelevant. What is relevant is that the Court allowed Petitioner to plead guilty believing he would be eligible for release after serving a certain amount of time. Had Petitioner known of the true and correct nature of the penalty, he would not have plead guilty. The Court's acceptance of his guilty plea under these circumstances and others, then was a complete miscarriage of justice warranting the withdrawal of the plea because before a guilty plea is accepted, a defendant must be aware of the outer limits of the punishment and the full consequences of the plea.

ARGUMENT

POINT III

INEFFECTIVE ASSISTANCE OF COUNSEL AT ALL LEVELS OF REPRESENTATION RESULTED IN DENIAL OF DUE PROCESS.

The threshold inquiry into claims of ineffective assistance of counsel is: (1) does the underlying issue have

merit, (2) was the course chosen by counsel designed to effect Petitioner's interest, and (3) did counsel's omission prejudice Petitioner. *Commonwealth v. Persinger,* supra. 532 Pa. at 321.

In addition to the substantive defects in the plea colloquy set out previously, Petitioner contends that trial counsel was ineffective for failing to correct these defects prior to the entry of his plea. This ineffective assistance of counsel caused Petitioner to enter his plea unknowingly, unintelligently, involuntarily, and without a full understanding of the consequences.

Trial counsel was ineffective for failing to insure that the Petitioner, who was 17 years old at the time, understood the terms and consequences of the plea, explain or have the court explain that a life sentence was a mandatory minimum sentence without parole eligibility, challenge the legality of the life sentence without a stated minimum sentence for parole eligibility, and file an appeal. Additionally, counsel's misleading and inaccurate statements to the Petitioner and his family that he would be eligible for parole after serving ten to fifteen years violated Petitioner's constitutional right to competent and effective counsel. As a result of this ineffectiveness, Petitioner entered his plea without a full understanding of the consequences, in violation of his constitutional rights. Trial counsel's derelictions were not reasonably designed to advance Petitioner's interests. In fact, counsel's deficient performance caused Petitioner to enter his plea unknowingly and involuntarily. See *Commonwealth v Persinger,* supra. at 323-24. As the purpose of the plea colloquy is to insure that a defendant enters his plea knowingly, intelligently, and voluntarily, it can not be said that trial counsel advanced Petitioner's interests when her

deficient performance prevented this from occurring. For similar reasons, Petitioner was prejudiced by counsel's ineffective assistance, as counsel's deficient performance led him to enter the plea unknowingly and involuntarily, thereby depriving him of his constitutional right to a jury trial. Counsel's ineffectiveness further prejudiced Petitioner in that he has spent the past 12½ years in prison as a result of a conviction that resulted from a defective and unlawfully induced guilty plea.

Thereafter, trial counsel was ineffective, for failing to file a motion to withdraw the guilty plea when she knew or should have known that there was a factual and/or legal basis for the withdrawal of the plea. Petitioner did not seek to withdraw his guilty plea based on the issues raised herein until now because trial counsel led him to believe that there was no basis for such action and because previous appellate counsel were ineffective. Furthermore,:

> [t]he Commonwealth's position is, in essence, that appellant, who was a juvenile at the time, should have recognized, without assistance of counsel, the defect in the guilty plea colloquy and his counsel's ineffectiveness. The law does not expect so much of appellant, a layman.

Commonwealth v. Allen, 278 Pa.Super. 501, 508, 420 A.2d 653, 656 (1980). In *Commonwealth v. Wilks,* 250 Pa.Super. 182, 191, 378 A.2d 887, 891 (1977), the Court held that "to require a criminal defendant to recognize the ineptitude of his lawyer would be unreasonable."

In *Persinger,* the Pennsylvania Supreme Court held that defense counsel was ineffective for failing to file a motion to withdraw pleas of guilty when the defendant

was never advised of the possibility of consecutive sentences. In that case the Supreme Court reasoned that the defendant's claim was of arguable merit because the defect in the plea colloquy rendered the plea unknowing and involuntary, rising to the level of a manifest injustice for the reasons previously discussed. Therefore, a basis existed for the withdrawal of the plea. Having found that the defendant's claim was of arguable merit, the Supreme Court concluded that he was prejudiced by counsel's failure to file a motion to withdraw the plea. *Commonwealth v. Persinger,* supra. The Supreme Court then concluded, without the benefit of an evidentiary hearing, that there could have been no reasonable basis designed to advance the defendant's interests for counsel's failure to file a meritorious motion on the defendant's behalf. Similarly, in the instant case, the failure to file a motion to withdraw the plea was not designed to advance Petitioner's interests and therefore prejudiced him.

In the instant case, neither counsel nor the trial court explained to Petitioner, nor did either seek to ascertain if he understood, that a consequence of his guilty plea could or would be a *mandatory minimum* sentence of life imprisonment without the possibility of parole. Petitioner had no prior experience with the criminal justice system. Moreover, counsel failed to object to the court's defective colloquy which denied Petitioner due process of law. Furthermore, counsel failed to raise this meritorious issue on appeal.

There could be no reason for counsel's failure to inform Petitioner that a special circumstance of his plea would preclude his release from incarceration for the remainder of his life. Moreover, guilty plea counsel's gross *misinformation* to Petitioner and his family, that he would

be eligible for parole sometime after serving ten to fifteen years, deprived Petitioner of his constitutional right to effective assistance of counsel.

Here, as in the *Persinger* case, failure of the court to abide by Standard 14-1.4, 2nd Edition, ABA Standards For Criminal Justice, resulted in Petitioner "suffering manifest injustice." Because such manifest injustice provided "adequate grounds for withdrawal of [Petitioner's] plea, counsel's failure to seek withdrawal of [such] plea was prejudicial to [Petitioner] . . . There was no reasonable basis for counsel's failure to to explain the consequences of the plea and, therefore, counsel was ineffective." *Commonwealth v. Persinger,* 532 Pa. at 323-24.

As set out previously, a PCHA petition and subsequent appeal to the Superior Court were filed by Attorney Rudenstein. In that appeal, counsel challenged only the defects in the colloquy pertaining to Petitioner's lack of understanding of the consequences of the plea. Even with that counsel was ineffective for this reason: Petitioner asked Attorney Rudenstein, prior to the conclusion of the PCHA evidentiary hearing, to call trial counsel Dunworth to the stand and ask her why she misinformed Petitioner and his family that he would be eligible for parole sometime after serving ten to fifteen years and why she failed to tell him that he would never be eligible for parole, but counsel failed to call her and establish for the record her ineffectiveness. As a result, the issues raised in the the instant appeal were never presented to the court for review. Pace himself did not knowingly and intelligently fail to raise these issues in any prior proceedings. Moreover, he has demonstrated the existence of extraordinary circumstances to justify his failure to raise these issues

before now. Petitioner Pace never gave Attorney Rudenstein permission to waive these issues, nor did Attorney Rudenstein inform him that if this and other issues were not raised in that PCHA Petition, these issues would be waived. Because the issues in this motion have merit, Attorney Rudenstein was constitutionally ineffective for failing to pursue these issues on appeal and for failing to raise Attorney Dunworth's ineffectiveness for failing to raise these issues.

In conclusion, Attorney Rudenstein was constitutionally ineffective for failing to raise prior counsel's ineffectiveness for failing to raise the issues herein, and for failing himself to raise the issues raised herein. Thus, resulting in a miscarriage of justice.

Based on the issues raised above, Petitioner is entitled to post conviction collateral relief under 42 Pa.C.S.A. Section 9543(a)(2)(v). This section provids for PCRA relief when a conviction has resulted from "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a state prisoner."

In the present case, Petitioner was deprived of his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when he entered his guilty plea unknowingly, unintelligently, and involuntarily because of the defects in the colloquy, because of the illegal sentence of life imprisonment without a stated minimum sentence for parole eligibility, and because of the deficient performance of his trial and appellant counsel. Because this claim implicates Pace's rights secured by the United States Constitution, he

would be entitled to federal habeas corpus relief if there is no state procedural bar to such relief.

As discussed previously, there is a potential waiver of the issues raised herein because they were not raised previously by trial or appellant counsel. However, the federal courts will excuse a state procedural default based upon a showing of cause and prejudice. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). Here the ineffective assistance of Petitioner's prior attorneys constitutes cause to excuse the procedural default because Petitioner had a constitutional right to counsel at the stages in the proceeding where counsel's ineffectiveness resulted in alleged waiver. *Commonwealth v. Eaddy,* 419 Pa.Super. 48, 56; 614 A.2d at 1203. Petitioner was prejudiced by this ineffective assistance for the reasons previously discussed. A convicted person has a right to an appeal and has the right to effective representation of counsel for purposed of the appeal. There is no effective representation when counsel through inadvertence or otherwise fails to raise an arguably meritorious issue on appeal. *Commonwealth v. Pfaff,* 477 Pa. 461, 384 A.2d 1179 (1978).

> This crucial right to direct review of all criminal convictions, guaranteed under the Pennsylvania Constitution, should not be lost due to the incompetent advice of prior counsel that no meritorious issues exist.

Eaddy, supra, 614 A.2d 1208.

When the failure to preseve an issue on direct appeal is the product of ineffective assistance of counsel, such failure does not result in a waiver of the issue for the

purposed of post conviction collateral relief. *Commonwealth v. McNeil,* 497 Pa. 187, 439 A.2d 664 (1982): *Commonwealth v. Felder,* 246 Pa.Super. 324, 370 A.2d 1214 (1976). In *Commonwealth v. Bable,* 248 Pa.Super. 496, 375 A.2d 350 (1977), the Superior Court concluded that counsel's ineffective assistance in failing to challenge the validity of a plea on on direct appeal, when there was a legal basis for such a challenge, constituted an extraordinary circumstance entitling the Petitioner to withdraw his plea pursuant to the PCHA proceeding. Moreover, when each of petitioner's PCRA previous attorneys is alleged to have rendered ineffective assistance of counsel, which if alleged would have preserved the issue for review, the issue of ineffective assistance of counsel is itself properly preserved for review. *Commonwealth v. Bradley,* 332 Pa.Super. 99, 480 A.2d 1205 (1984); *Commonwealth v. Nelson,* 393 Pa.Super. 611, 574 A.2d 1107, 1109 (1990); *Commonwealth v. Perlman,* 392 Pa.Super. 1, 572 A.2d 2 (1990).

Petitioner's claims, then, are cognizable under the PCRA even if they do not implicate the truth determining process. *Id.,* 614 A.2d at 1208.

CONCLUSION

For the foregoing reasons and arguments, this Petitioner respectfully requests that a new trial be granted or a withdrawal of his guilty plea with the opportunity to plea anew.

Respectfull submitted by:

/s/ John A. Pace
JOHN A. PACE, Pro se, appellant
P.O. Box 244
Graterford, Pennsylvania 19426-0244

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	Criminal Division
JOHN ALLEN PACE, Defendant	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, DOROTHY CLEMMONS, hereby certify that:

1. I am the biological mother of John Allen Pace, and I reside at 6125 Yocum Street, Philadelphia, Pennsylvania, 19143.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

/s/ Dorothy Clemmons
Dorothy Clemmons

I, DOROTHY CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96
Date

/s/ Dorothy Clemmons
Dorothy Clemmons

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	Criminal Division
JOHN ALLEN PACE, Defendant	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, MORRIS CLEMMONS, hereby certify that:

1. I am the biological father of John Allen Pace, and I reside at 1537 N. 54 Street, Philadelphia, Pennsylvania, 19131.

2. Between October and February of 1985-86, I met with my son's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street, Suite 709, Philadelphia, Pennsylvania, to discuss my son's criminal case in the above captioned matter.

3. Because my son was a juvenile at the time, Attorney Dunworth was consulting with me to determine what was best for my son. It was during one of these meetings that Attorney Dunworth advised me that she wanted my son to plead guilty to second degree murder and asked me to talk to my son and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my son pleaded guilty to second degree murder, he would be out of prison in ten years.

5. Because I believed Attorney Dunworth's statement that my son would get released after ten years if he pleaded guilty to the second degree murder charge, I advised my son to enter the guilty plea which he subsequently did.

I, MORRIS CLEMMONS, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.s. §4904), relating to unsworn falsification to authorities.

11/6/96
Date

/s/ Morris Clemmons
Morris Clemmons

EXHIBIT C

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA
v.	:	Criminal Division
JOHN ALLEN PACE, Defendant	:	Docket No.: 1272-1275 October Term, 1985

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Philadelphia :

I, HUGH PACE, hereby certify that:

1. I am the biological brother of John Allen Pace, and I reside at 5915 Baynton Street, Philadelphia, PA 19144.

2. Between October and February of 1985-86, I, along with my parents, met with my brother's attorney, Ms. Moira Dunworth, Esquire, 1422 Chestnut Street,

Suite 709, Philadelphia, Pennsylvania, to discuss my brother's criminal case in the above captioned matter.

3. Because my brother was a juvenile at the time, Attorney Dunworth was consulting with my parents and me to determine what was best for my brother. It was during one of these meetings that Attorney Dunworth advised me that my brother should plead guilty to second degree murder. Attorney Dunworth asked us to talk to my brother and convince him that this was the best route for him to take.

4. Attorney Dunworth also informed me that if my brother pleaded guilty to second degree murder, he would be out of prison after ten years.

5 Because my parents and I believed Attorney Dunworth's statement that my brother would be eligible for parole sometime after serving ten years if he pleaded guilty to the second degree murder charge, I, along with my parents, advised my brother to enter the guilty plea which he subsequently did do.

11/5/96
Date

/s/ Hugh D. Pace
Hugh Pace

I, HUGH PACE, do hereby verify that the facts set forth in the above Affidavit are true and correct to the best of my knowledge, information and belief. I realize that any false statements contained in this Affidavit are made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. §4904), relating to unsworn falsification to authorities.

11/5/96
Date

/s/ Hugh D. Pace
Hugh Pace

EXHIBIT D

David S. Rudenstein
Attorney At Law

[Address Omitted In Printing]

May 21, 1990

PLEASE RESPOND TO:

Mr. John Pace
AY-6445
Box 200
Camp Hill, PA 17001-0200

RE: Commonwealth vs. Pace

Dear Mr. Pace:

Please be advised that I am in receipt of your letter, dated May 5, 1990. I have reviewed the issues raised there in and I do think that I have raised these issues with the P.C.R.A. Court, but, at the same time, I just hope that I have not misunderstood anything in your letter. Basically, the main issue that I have raised with the P.C.R.A. Court was that your plea was not voluntary or knowing because it was never explained to you that Life in Pennsylvania meant Life without parole.

There were also other issues that I would have liked to have placed on the record via an evidentiary hearing, to wit, your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family. However, because Judge McCrudden denied me an evidenciary hearing, this is not of record.

I am sure the Judge will be denying our petition, thereafter, I will file notice of appeal to Superior Court raising the issues I have raised in the P.C.R.A. petition and will of course, also ask for an evidenciary hearing.

Thank you.

Very truly yours,

/s/ David Rudenstein
David Rudenstein

DSR/mer

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NOVEMBER TERM, 1985
	:	NO. 1272,1/1
v.	:	
	:	
JOHN PACE	:	SUPERIOR COURT NO.

OPINION

SAVITT, J. JULY 29, 1997

PROCEDURAL HISTORY

Petitioner John Pace pled guilty to second degree murder and possession of an instrument of a crime for the beating death and robbery of Randolph Baldwin on September 18, 1985. A thorough and complete guilty plea colloquy was conducted by this court on February 13, 1986. Neither a motion to withdraw the guilty plea nor a direct appeal was ever filed.

On August 21, 1986 petitioner filed a *pro se* PCRA petition, counsel was appointed and filed an amended petition on March 31, 1987. On July 25, 1988 the Commonwealth's Motion to Dismiss, which had been filed on June 3, 1987, was denied and a evidentiary hearing was held on November 15, 1988. On June 16, 1989 counsel was permitted to withdraw and new counsel was appointed and filed a supplemental amended petition. Another evidentiary hearing was held on March 26, 1991 and on July 23, 1991 the court granted the Commonwealth's second motion to dismiss, which had been filed on March 29, 1990. On March 30,1992 Superior Court affirmed the lower court and petitioner filed a petition for allowance of appeal which was denied by the Pennsylvania Supreme Court on September 2,1992.

The second and instant petition was filed on March 24,1997, counsel was appointed and filed a Finley letter on June 17, 1997. Petitioner was timely notified and, on July 23,1997, the petition was dismissed. This appeal followed.

The sole issue raised by petitioner here, that his guilty plea was not knowing and voluntary, was raised in petitioner's first PCRA petition. A petitioner is not entitled to PCRA review on an issue which has been previously litigated. An issue has been previously litigated if the highest appellate court in which petitioner could have review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S.A. §9544(a)(2) or has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa.C.S.A. §9544(a)(3). Here the identical issue was not only raised and decided in a collateral proceeding but also reviewed by the Superior Court and decided against petitioner. Clearly, he is not entitled to a new trial on this basis.

Further, a review of the record of both the guilty plea colloquy and the collateral proceeding reveals that there are no issues of arguable merit. Petitioner's guilty plea colloquy was thorough and complete, petitioner answered every question indicating that he understood and there is no showing on the record of the previous collateral proceedings that petitioner was misled by trial counsel. Accordingly, petitioner is not entitled to relief on this basis.

For the reasons set forth herein the instant PCRA petition was denied.

/s/ Savitt
J.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRIST

COMMONWEALTH OF PENNSYLVANIA,	:	Superior Court Docket No. 03642PHL97
Appelle	:	
vs.	:	
JOHN A. PACE,	:	Trial Court Docket Nos. OCTOBER TERM, 1985
Appellant	:	No. 1272, 1/1

PROOF OF SERVICE

I hereby certify that I am this day of April serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail addressed as follows:

District Attorney of Philadelphia (215) 686-5729
Appeals Unit
1421 Arch Street
Philadelphia, PA 19102

Attention: Peter j. Gardner, Assistant D.A.

/s/ John A. Pace
John A. Pace, AY-6445
P.O. Box 244
Graterford, PA 19426-0244